122-79

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

No. 283.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

BENJAMIN B. KNIGHT AND ROBERT KNIGHT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 2, 1884.

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1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Friday, the eleventh day of April, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and eighth year.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

BENJAMIN B. KNIGHT and ROBERT KNIGHT
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Assumpsit.

Be it remembered that on the fifth day of March, A. D. 1883, there was filed in the office of the clerk of said court a bond for costs, and also a transcript of the record from the superior court of Cook county, Illinois, in said above-entitled cause, which said bond and transcript are, respectively, in the words and figures following, to wit:

2 *Bond for Costs.*

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

Circuit Court. March Term, A. D. 1883.

BENJAMIN B. KNIGHT and ROBERT KNIGHT
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO.

In assumpsit.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and, in default of payment by the defendant of any costs ordered or adjudged to be paid by it, I hereby agree and stipulate that execution may issue against my property for any costs taxed against it.

Dated this 5th day of March, A. D. 1883.

CHAS. H. WOOD.

Endorsed: Filed M'ch 5th, A. D. 1883. W. H. Bradley, clerk.

3 *Transcript.*

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, }
County of Cook, } *ss:*

Pleas before the Honorable Joseph E. Gary, one of the judges of the superior court of Cook county, in the State of Illinois, holding

a branch court of said court at a regular term of said superior court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the fifth day, of February, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the hundred and seventh.

Present: The Honorable Joseph E. Gary, judge of the superior court of Cook county; Luther Laflin Mills, State's attorney; Seth F. Hanchett, sheriff of Cook county.

Attest: JOHN J. HEALY, *Clerk.*

Be it remembered that heretofore, to wit, on the nineteenth day of December, in the year of our Lord one thousand eight hundred & eighty-two, there was filed in the office of the clerk of the superior court of Cook county a certain *præcipe* for summons, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

Superior Court of Cook County.

4 BENJAMIN B. KNIGHT [AND] ROBERT KNIGHT, Plaintiffs,
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY, Defendants.

Assumpsit. Damages, $15,000.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of assumpsit, to the damage of said plaintiffs in the sum of fifteen thousand dollars, direct the same to the sheriff of Cook county to execute, and make it returnable to the January term of said court, A. D. 1883.

Chicago, Dec. 18th, 1882.

ROSENTHAL & PENCE,
Plaintiffs' Attorneys.

To John J. Healy, Esq., clerk.

And on the day and year last aforesaid, to wit, December nineteenth, A. D. 1882, there issued out of the office of the clerk of said court the people's writ of summons, which writ, with the return of the sheriff thereon endorsed, is in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

The People of the State of Illinois to the sheriff of said county, Greeting:

5 We command you that you summon the St. Louis, Iron Mountain and Southern Railway Company, if it shall be found in your county, personally to be and to appear before the

superior court of Cook county, on the first day of the term thereof, to be holden at the court-house, in the city of Chicago, in said Cook county, on the first Monday of January next, to answer unto Benjamin B. Knight and Robert Knight in a plea of trespass on the case upon promises, to the damage of said plaintiffs, as it is said, in the sum of fifteen thousand dollars.

And have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness John J. Healy, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 19th day of December, A. D. 1882.

[SEAL.] JOHN J. HEALY, *Clerk.*

Served this writ on the within-named defendant, The St. Louis, Iron Mountain, and Southern Railway Company, by leaving a copy thereof with W. H. Knight, general freight agent of said railway company, the president of said company not found in my county, the 26th day of December, 1882.

SETH F. HANCHETT, *Sheriff,*
By D. W. NICKERSON, *Deputy.*

6 And afterwards, to wit, on the nineteenth day of December, in the year last aforesaid, to wit, A. D. 1883, there was filed in the office of the clerk of said court a certain bond, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

Superior Court of Cook County.

BENJAMIN BRAYTON KNIGHT [AND] ROBERT KNIGHT
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY.

I do hereby enter myself security for cost in this cause and acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State.

Dated this 18th day of December, 1882.

A. M. PENCE.

And afterwards, to wit, on the twenty-fifth day of January, in the year of our Lord one thousand eight hundred & eighty-three, there was filed in the office of the clerk of said court a certain declaration, which is in words and figures as follows, to wit:

7 STATE OF ILLINOIS, } ss:
Cook County, }

In the Superior Court of Cook County. January Term, A. D. 1883.

Benjamin B. Knight and Robert Knight, copartners doing business under firm name [and] style of B. B. & R. Knight, plaintiffs in

this suit, by Rosenthal and Pence, their attorneys, complain of the St. Louis, Iron Mountain & Southern Railway Company, defendant in this suit, summoned, etc., of a plea of trespass on the case on promises—

For that whereas the said defendant heretofore, to wit, on the twelfth (12th) day of December, in the year of our Lord one thousand eight hundred and eighty-two, at Providence, in the State of Rhode Island, to wit, at the county aforesaid, became and was indebted to the said plaintiffs, as copartners under the name and style aforesaid, in the sum of twelve thousand (12,000) dollars, of lawful money of the United States of America, for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendant, and at the special instance and request of the said defendant; and, being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned when the said defendant should be thereunto afterwards requested;

8 And whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiffs had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiffs, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiffs so much money as the last aforesaid goods, wares, and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said defendant should be thereunto afterwards requested; and the said plaintiffs aver that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of twelve thousand (12,000) dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year and at the place aforesaid, had notice;

And whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, was indebted to the said plaintiffs, copartners as aforesaid, in the further sum of twelve thousand (12,000) dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the like request of the said defendant, and in the like sum for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant and at the like request of the said defendant; and in the like sum for

9 other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and in the like sum for other money before that time and then due and owing the said plaintiffs for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiffs; and in the like sum for the price

and value of work then done and material for the same provided by the said plaintiffs for the said defendant and at the like special request of the said defendant. And, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested;

And whereas also the said defendant afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and, upon such accounting, the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of twelve thousand (12,000) dollars, of like lawful money aforesaid; and, being so found in arrear and indebted to the said plaintiffs; the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned when the said defendant should be thereunto afterwards requested: Nevertheless the said defendant (although often requested, etc.) has not yet paid the said several sums of money above mentioned or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the said defendant has hitherto altogether refused, and still does refuse; to the damage of the said plaintiffs of twelve thousand (12,000) dollars; and therefore the said plaintiffs bring suit, etc.

ROSENTHAL & PENCE,
Plaintiffs' Attorneys.

Copy of Account Sued on.

The St. Louis, Iron Mountain & Southern Railway Co. to Benjamin B. Knight and Robert Knight, Dr.

To goods, wares, and merchandise sold and delivered	$12,000
To money lent and advanced	$12,000
To money paid, laid out, and expended	$12,000
To money had and received to and for the use of said plaintiffs	$12,000
To money due for interest and forbearance	$12,000
To labor, services, and material	$12,000
To balance due on account stated	$12,000

And afterwards, to wit, on the twelfth day of February, in the year last aforesaid, to wit, A. D. 1883, there was filed in the office of the clerk of said court a certain additional count of declaration, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, }
Cook County, } ss:

In the Superior Court of Cook County.

Benjamin B. Knight and Robert Knight, copartners under the firm name and style of B. B. & R. Knight, plaintiffs in this suit, by Rosenthal and Pence, their attorneys, complain of the St. Louis, Iron Mountain & Southern Railway Company, defendant, of a plea of trespass on the case on promises, for that whereas the defendant, which is a corporation duly organized, before and at the time of the making of its promise and undertaking hereinafter next mentioned, was a common carrier and forwarder of goods and chattels for hire, and the said defendant, being such carrier and forwarder as aforesaid, one G. T. Potter heretofore, to wit, on the fifth day of December, A. D. 1879, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, at the special instance and request of the said defendant, caused to be delivered to said defendant, so being such carrier and forwarder as aforesaid, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, certain goods and chattels, to wit, 20 bales of cotton, weighing, to wit, 10,132 pounds, marked (P P), of the said G. T. Potter, of great value, to wit, of the value of two thousand dollars, lawful money, to be taken care of and safely and securely carried and conveyed by the said defendant, as such carrier as aforesaid, from Texarkana, in the State
12 of Arkansas, to St. Louis, in the State of Missouri, and from thence to be forwarded to Woonsocket, in the State of Rhode Island, and in consideration thereof and a certain reward to the said defendant in that behalf — it, the said defendant, being such carrier and forwarder, then and there, to wit, on the day and year aforesaid, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, undertook and faithfully promised the said G. T. Potter to take care of said goods and chattels and safely to receive, carry, and convey the same from Texarkana, in the State of Arkansas aforesaid, to the city of St. Louis, in the State of Missouri, and from thence to forward the same to Woonsocket, in the State of Rhode Island aforesaid.

And the said plaintiffs further aver that, to wit, on the day and year last aforesaid, it, the said defendant, for the consideration aforesaid, issued and delivered to the said Potter a certain bill of lading for the said goods and chattels, and therein and thereby acknowledged the receipt of said goods and chattels, and thereby undertook and promised to carry, convey, and forward the same as hereinbefore set forth; and thereupon said Potter, for a valuable consideration to him paid, then and there, to wit, on the day and year last aforesaid, sold and assigned the said bill of lading to Messrs. Dodge, Potter and Company, or order, and that the said Dodge, Potter and Company did then and there, to wit, on the day and year last aforesaid, for a valuable consideration to them paid by said plain-
13 tiffs, sell, assign, and deliver said bill of lading to said plaintiffs, and said plaintiffs aver that by means thereof and the endorsements thereon the right and title to said goods and chattels,

and the right to the possession thereof, passed to and became vested in them.

And plaintiffs further aver that although the said defendant, as such carrier and forwarder as aforesaid, then received said goods and chattels, to wit, on Dec. 5th, 1879, at the place first aforesaid, for the purpose aforesaid, yet, not regarding its said promise and duty, it has not taken care of the said goods and chattels, nor safely carried and forwarded the same from Texarkana, in the State of Arkansas, to Woonsocket, in the State of Rhode Island; but, on the contrary thereof, the said defendant so carelessly behaved itself with said goods and chattels that, by and through the mere negligence and the improper conduct of the defendant and its servants in this behalf, the said goods and chattels afterwards, to wit, on the day aforesaid became and were wholly lost to said plaintiffs.

And whereas, also, the defendant, which is a corporation duly organized before and at the time of the making of its promise and undertaking hereinafter mentioned, was a common carrier and forwarder of goods and chattels for hire, and the said defendant, being such carrier and forwarder as aforesaid, one G. T. Potter heretofore, to wit, on the 16th day of December, 1879, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, at the special instance and request of the said defendant, caused to be deliv-
14 ered to the said defendant, so being such carrier and forwarder as aforesaid, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, certain other goods and chattels and goods, to wit, 150 bales of cotton, marked "R O V," weighing, to wit, 75,435 pounds, of the said G. T. Potter, of great value, to wit, of the value of $12,000, lawful money, to be taken care of and safely and securely carried and conveyed by the said defendant, as such carrier as aforesaid, from Texarkana, in the State of Arkansas, to St. Louis, in the State of Missouri, and from thence to be forwarded to Providence, in the State of Rhode Island; and in consideration thereof, and a certain reward to the said defendant in that behalf, it, the said defendant, being such carrier and forwarder, then and there, to wit, on the day and year aforesaid, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, undertook and faithfully promised the said G. T. Potter to take care of said goods and chattels and safely to receive, carry, and convey the same from Texarkana, in the State of Arkansas aforesaid, to the city of St. Louis, in the State of Missouri, and from thence to forward the same to the city of Providence, in the State of Rhode Island aforesaid.

And the said plaintiffs further aver that, to wit, on the day and year last aforesaid it, the said defendant, for the consideration aforesaid, issued and delivered to the said Potter a certain bill of lading for the said goods and chattels, and therein and thereby ac-
15 knowledged the receipt of said goods and chattels, and thereby undertook and promised to carry, convey, and forward the same as hereinbefore set out; and thereupon the said Potter, for a valuable consideration to him paid, then and there, to wit, on the day and year last aforesaid, sold, assigned, and delivered said bill of lading to said plaintiffs; and said plaintiffs aver that by means

thereof and the endorsements thereon the right and title to said goods and chattels, and the right to the possession thereof, passed to and became vested in them.

And plaintiffs further aver that although said defendant, as such carrier and forwarder as aforesaid, then received said goods and chattels, to wit, on December the 16th, 1879, at the place first aforesaid, for the purpose aforesaid, yet not regarding its said promise and duty it has not taken care of the said goods and chattels, nor safely carried and forwarded the same from Texarkana, in the State of Arkansas to said Providence, in the State of Rhode Island, but, on the contrary thereof, the said defendant so carelessly behaved itself with respect to said goods and chattels that by and through the mere negligence and the improper conduct of the defendant and its servants in this behalf, the said goods and chattels afterwards, to wit, on the day last aforesaid, became and were wholly lost to said plaintiffs.

And whereas also the defendant, which is a corporation duly organized before and at the time of the making of its promise and undertaking hereinafter next mentioned, was a common car-
16 rier and forwarder of goods and chattels for hire, and the said defendant, being such carrier and forwarder as aforesaid, one G. T. Potter heretofore, to wit, on the 20th day of December, 1879, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, at the special instance and request of the said defendant, caused to be delivered to the said defendant, so being such carrier and forwarder as aforesaid, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, certain other goods and chattels, to wit, nineteen bales of cotton marked (P P), weighing 9,557 pounds, of the said G. T. Potter, of great value, to wit, of the value of $2,000 lawful money, to be taken care of and safely and securely carried and conveyed by the said defendant as such carrier as aforesaid from Texarkana, in the State of Arkansas, to St. Louis, in the State of Missouri, and from thence to be forwarded to Providence, in the State of Rhode Island, and in consideration thereof, and a certain reward to the said defendant in that behalf —, it, the said defendant, being such carrier and forwarder, then and there, to wit, on the day and year last aforesaid, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, undertook and faithfully promised the said G. T. Potter to take care of said goods and chattels, and safely carry and convey the same from Texarkana, in the State of Arkansas aforesaid, to the city of St. Louis, in the State of Missouri, and from thence to forward to same to Providence, in the State of Rhode Island, aforesaid.

17 And the said plaintiffs further aver that on the day and year last aforesaid it, the said defendant, for the consideration last aforesaid, issued and delivered to the said Potter a certain bill of lading for the said goods and chattels, and therein and thereby acknowledged the receipt of said goods and chattels, and thereby undertook and promised to carry and forward the same as hereinabove set out; and thereupon said Potter, for a valuable consideration to him paid, then and there, to wit, on the day and year last

aforesaid, sold, assigned, and delivered said bill of lading to said plaintiffs; and said plaintiffs aver that by means thereof and the endorsements thereon the right and title to said goods and chattels, and the right to the possession thereof, passed to and became vested in them; and plaintiffs further aver that, although said defendant, as such carrier and forwarder as aforesaid, then received said goods and chattels, to wit, on December 20th, 1879, at the place first aforesaid, for the purpose aforesaid; yet, not regarding its said promise and duty, it has not taken care of the said goods and chattels, nor safely carried and forwarded the same from Texarkana, in the State of Arkansas, to Providence, in the State of Rhode Island, but, on the contrary thereof, the said defendant so carelessly behaved itself with respect to said goods and chattels that by and through the mere negligence and the improper conduct of the defendant and its servants in this behalf, the said goods and chattels afterwards, to wit, on the day aforesaid, became and were wholly lost to said plaintiffs;

And whereas also the defendant, which is a corporation
18 duly organized before and at the time of making its promise and undertaking hereinafter next mentioned, was a common carrier and forwarder of goods and chattels for hire, and the said defendant, being such carrier and forwarder as aforesaid, one G. T. Potter, to wit, on the 23rd day of December, 1879, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, at the special instance and request of said defendant, caused to be delivered to the said defendant, so being such carrier and forwarder as aforesaid, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, certain other goods and chattels, to wit, seven bales of cotton 3,535 pounds, marked (G. M.) S. S., of the said G. T. Potter, of great value, to wit, of the value of $600.00, lawful money; also sixty other bales of cotton weighing, to wit, 29,822 pounds, marked (S. M.) S. S., of the said G. T. Potter, of great value, to wit, of the value of $5,000.00, lawful money; also 100 other bales of cotton weighing, to wit, 53,000 pounds, marked "X X E," of the said G. T. Potter, of great value, to wit, of the value of $8,000, lawful money, to be taken care of, and safely and securely carried and conveyed by the said defendant, as such carrier as aforesaid, from Texarkana, in the State of Arkansas, to St. Louis, in the State of Missouri, and from thence to be forwarded to Providence, in the State of Rhode Island; and, in consideration thereof and a certain reward to the said defendant in that behalf, it, the said defendant, being such carrier and forwarder, then and there, to wit, on the day and year aforesaid, at
Texarkana, in the State of Arkansas, to wit, at Cook county
19 aforesaid, undertook and faithfully promised the said G. T. Potter to take care of said goods and chattels, and safely to receive, carry, and convey the same from Texarkana, in the State of Arkansas aforesaid, to the city of St. Louis, in the State of Missouri, and from thence to forward the same to Providence, in the State of Rhode Island, aforesaid.

And the said plaintiffs further aver that, to wit, on the day and year last aforesaid, it, the said defendant, for the consideration aforesaid, issued and delivered to said Potter a certain bill of lading for

the said goods and chattels, and therein and thereby acknowledged the receipt of said goods and chattels, and thereby undertook and promised to carry, convey, and forward the same as hereinbefore set out; and thereupon said Potter, for a valuable consideration to him paid, then and there, to wit, on the day and year last aforesaid, sold, assigned, and delivered said bill of lading to the Farmers' and Merchants' Bank of Paris, Texas, or order; and that the said Farmers' and Merchants' Bank of Paris, Texas, did then and there, to wit, on the day and year last aforesaid, for a valuable consideration to them paid by Donnell, Lawson & Co., sell, assign, and deliver said bill of lading to said Donnell, Lawson & Co., or order; and that the said Donnell, Lawson and Co. did then and there, to wit, on the day and year last aforesaid, for a valuable consideration to them paid by said plaintiffs, sell, assign, and deliver said bill of lading to said plaintiffs; and said plaintiffs aver that by means thereof and
20 the endorsements thereon the right and title to said goods and chattels and the right to the possession thereof passed to and became vested in them.

And the plaintiffs further aver that, although the said defendant, as such carrier and forwarder as aforesaid, then received said goods and chattels, to wit, on December 23rd, 1879, at the place first aforesaid, for the purpose aforesaid, yet not regarding its said promise and duty, it had not taken care of the said goods and chattels nor safely carried and forwarded the same from Texarkana, in the State of Arkansas, to Providence, in the State of Rhode Island, but on the contrary thereof, the said defendant so carelessly behaved itself with respect to said goods and chattels that by and through the mere negligence and the improper conduct of the defendant and its servants in this behalf, the said goods and chattels afterwards, to wit, on the day last aforesaid, became and were wholly lost to said plaintiffs.

And that whereas also the defendant, which is a corporation duly organized before and at the time of making of its promise and undertaking hereinafter next mentioned, was a common carrier and forwarder of goods and chattels for hire, and the said defendant, being such carrier as aforesaid, one G. T. Potter heretofore, to wit, on the 2nd day of January, 1880, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, at the special instance and request of the said defendant, caused to be delivered to the said defendant, so being such carrier, and forwarder as aforesaid, at Texarkana, in the State of Arkansas, to wit, at Cook county aforesaid, certain other
21 goods and chattels, to wit, twenty-two bales of cotton weighing, to wit, 11,211 pounds, marked (S M) K, of the said G. T. Potter, of great value, to wit, of the value of $2,000, lawful money, to be taken care of and safely and securely carried and conveyed by said defendant, as such carrier as aforesaid, from Texarkana, in the State of Arkansas, to St. Louis, in the State of Missouri, and from thence to be forwarded to Providence, in the State of Rhode Island, and, in consideration thereof, and a certain reward to the said defendant in that behalf, it, the said defendant, being such carrier and forwarder, to wit, on the day and year aforesaid, at Texarkana, in

the State of Arkansas, to wit, at Cook county aforesaid, undertook and faithfully promised to said G. T. Potter to take care of said goods and chattels and safely receive, carry, and convey the same from Texarkana, in the State of Arkansas aforesaid, to the city of St. Louis, in the State of Missouri, and from thence to forward the same to Providence, in the State of Rhode Island, aforesaid.

And the said plaintiffs further aver that, to wit, on the day and year last aforesaid, it, the said defendant, for the consideration aforesaid, issued and delivered to the said Potter a certain bill of lading for the said goods and chattels, and therein and thereby acknowledged the receipt of said goods and chattels, and thereby undertook and promised to carry, convey, and forward the same as hereinbefore set out.

22 And thereupon said Potter, for a valuable consideration to him paid, then and there, to wit, on the day and year last aforesaid, sold, assigned, and delivered said bill of lading to the Commercial Bank of Texarkana, *of* Arkansas, or order, and that the said Commercial Bank of Texarkana did then and there, to wit, on the day and year last aforesaid, for a valuable consideration to it paid by the Boatman's Savings Bank of St. Louis, sell, assign, and deliver said bill of lading to said Boatman's Savings Bank of St. Louis, or order, and that the said Boatman's Savings Bank of St. Louis did then and there, to wit, on the day and year last aforesaid, for a valuable consideration to it paid by G. E. Martin, cashier, sell, assign, and deliver said bill of lading to said G. E. Martin, cashier, or order, and that the said G. E. Martin, cashier, did then and there, to wit, on the day and year last aforesaid, for a valuable considertion to him paid by said plaintiffs, sell, assign, and deliver said bill of lading to said plaintiffs, and said plaintiffs aver that by means thereof, and the endorsements thereon, the right and title to said goods and chattels, and the right to the possession thereof, passed to and became vested in them.

Plaintiffs further aver that although the said defendant, as such carrier and forwarder as aforesaid, then received said goods and chattels, to wit, on January the 2nd, 1880, at the place first aforesaid, for the purpose aforesaid, yet, not regarding its said promise and duty, it has not taken care of the said goods and chattels, nor safely carried and forwarded the same from Texarkana, in the State of Arkansas, to Providence, in the State of Rhode Island, but,

23 on the contrary thereof, the said defendant so carelessly behaved itself with respect to said goods and chattels that, by and through the mere negligence and improper conduct of the defendant and its servants in this behalf, the said goods and chattels afterwards, to wit, on the day aforesaid, became and were wholly lost to said plaintiffs.

Wherefore the plaintiffs say that they are injured and have sustained damage to the amount of $15,000; and therefore they bring this suit, etc.

ROSENTHAL & PENCE,
Plaintiffs' Att'ys.

Statement of Accounts.

St. Louis, Iron Mountain & Southern Railway Comp'y to B. B. & R. Knight, Dr.

To	20	bales cotton marked	(P. P.)	$2,000 00
"	150	" "	R. O. V.	12,000 00
"	19	" "	(P. P.)	2,000 00
"	7	" "	(G. M.) S. S.	600 00
"	60	" "	(S. M.) S. S.	5,000 00
"	100	" "	XX. E.	8,000 00
"	22	" "	(S. M.) K.	2,000 00
				$31,600 00

And afterwards, to wit, on the 23rd day of February, in the year last aforesaid, to wit, A. D. 1883, there was filed in the office of the clerk of said court a certain plea, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, }
County of Cook, } ss:

24 In the Superior Court. January Term, 1883.

BENJAMIN B. KNIGHT and ROBERT KNIGHT
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO.

Assumpsit.

And the defendant, by Charles H. Wood, its attorney, comes and defends the wrong and injury when, etc., and says that it did not promise, in manner and form as the plaintiff has above thereof complained against it, and of this it puts itself upon the country, &c.

CHAS. H. WOOD,
Att'ys for Def't.

And afterwards, to wit, on the 24th day of February, in the year last aforesaid, to wit, A. D. 1883, the same being one of the days of the February term of said court, the following among other proceedings were had in said court and entered of record, to wit:

BENJAMIN B. KNIGHT *et al.*
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

On motion of plaintiffs' attorneys it is ordered that leave be, and is hereby, given the sheriff to amend the return on the summons issued in said cause.

25 And afterwards, to wit, on the 26th day of February, in the year last aforesaid, to wit, A. D. 1883, there were filed in office of the clerk of said court a certain notice, petition, and bond, which are in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

BENJAMIN B. KNIGHT *et al. vs.* THE ST. L., I. M. & S. R'Y CO.

Assumpsit.

To Messrs. Rosenthal & Pence, att'ys for said plaintiffs:

Please take notice that on Monday, the 26th day of February, A. D. 1883, at 10 a. m., or as soon thereafter as counsel can be heard, I shall before his honor Judge Gary apply to the court for leave to remove the above cause to the circuit *circuit* court of the United States for the northern district of Illinois.

Dated Chicago, Feb. 24, 1883.

CHAS. H. WOOD,
Attorney for Def't.

Service of the within notice by copy is accepted this 24th day of Feb., 1883.

ROSENTHAL & PENCE.

Petition for Removal by Non-Resident.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

26 BENJAMIN B. KNIGHT and ROBERT KNIGHT
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

To the honorable the judges of the superior court of Cook county, State of Illinois.

Your petitioner, the said defendant, respectfully shows that the matter and amount involved in the above-entitled cause exceeds, exclusive of costs, the sum or value of five hundred dollars.

Your petitioner further shows that the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of Missouri, and that the plaintiffs were then and still are citizens of the State of Rhode Island.

And your petitioner offers herewith a bond, with good and sufficient surety, in the penal sum of five hundred dollars conditioned for its entering in the circuit court of the United States for the northern district of Illinois on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to proceed no further herein except to make the order of removal required by law

and to accept the said surety and bond and to cause the
27 record herein to be removed into said circuit court of the United States within and for the northern district of Illinois according to the statute in such case made and provided.

And your petitioner will ever pray, etc.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.,
By R. S. HAYES, *1st Vice-Pres't.*

CHAS. H. WOOD,
Attorney for Petitioner.

STATE OF MISSOURI, } ss:
City of St. Louis, }

R. S. Hayes, being duly sworn, on oath deposes and says that he is the 1st vice-president of the St. Louis, Iron Mountain and Southern Railway Co., the defendant in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof and the matters and things therein stated are true, as he verily believes.

R. S. HAYES.

Subscribed and sworn to by said R. S. Hayes this fifteenth day of February, A. D. 1883.

Before me—
[SEAL.] THOMAS G. PORTES,
Notary Public.

Know all men by these presents that The St. Louis, Iron Mountain and Southern Railway Company, as principal, and John R. Hoxie,
of town of Lake, in the county of Cook and State of Illinois,
28 as surety, are held and firmly bound unto Benjamin B. Knight and Robert Knight in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, or administrators, jointly and severally and firmly, by these presents.

Witness our hands and seals this 23rd day of February, A. D. 1883.

The condition of this obligation is such that if the above-bounden St. Louis, Iron Mountain and Southern Railway Co. shall enter and file, or cause to be entered and filed, in the next circuit court of the United States in and for the northern district of Illinois, on the first day of its next session, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the superior court of Cook county, State of Illinois, in which Benjamin B. Knight and Robert Knight are plaintiffs and the St. Louis, Iron Mountain and Southern Railway Co. is defendant, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of

such suit from said State court into the United States Court, then this obligation to be void; otherwise of force.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
By R. S. HAYES, *1st Vice-Pres'd't.* [SEAL.]
JOHN R. HOXIE. [SEAL.]

Attest: [SEAL.] S. D. BARLOW,
Ass't Sec'y.

29 And afterwards, to wit, on the 26th day of February, in the year last aforesaid, to wit, A. D. 1883, the same being one of the days of the February term of said court, the following, among other, proceedings, were had in said court and entered of record, to wit:

BENJAMIN B. KNIGHT *et al.*
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY. } 85105.

Assumpsit.

On motion of defendant's attorney it is ordered that this cause be and is hereby transferred to the United States circuit court in and for the northern district of Illinois, and that the clerk of this court do forthwith transmit to said United States circuit court a full and complete transcript of all papers and pleadings filed in said cause, together with all orders made and entered of record herein.

STATE OF ILLINOIS, } *ss:*
County of Cook, }

I, John J. Healy, clerk of the superior court of Cook county in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court, on the common law side thereof, wherein Benjamin B. Knight *et al.* were plaintiffs and The St. Louis, Iron M. & S. R'y Co. was defendant.

30 In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 3rd day of March, A. D. 1883.

[SEAL.] JNO. J. HEALY, *Clerk.*

Endorsed: Filed Mar. 5, 1883.
WM. H. BRADLEY, *Clerk.*

Afterwards, to wit, on the sixth day of February, 1884, in the December term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

BENJAMIN B. KNIGHT and ROBERT KNIGHT
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Assumpsit.

Now come the parties, by their attorneys, and upon issue joined herein thereupon come a jury of good and lawful men, to wit, Charles Lucas, Jacob Fritch, Alonzo Heath, Augustus Nord, George H. Taylor, L. P. Narramore, F. E. Shandrew, W. W. Parrish, D. W. Cresey, Edward Bohanan, R. V. Stocking, and William Petty, who
31 were all duly elected, tried, and sworn well and truly to try said issue, and after hearing the opening statements of the respective counsel, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the seventh day of February, 1884, in the December term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

BENJAMIN B. KNIGHT *et al.*
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

And afterwards, to wit, on the eighth day of February, 1884, in the December term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

32 *Order.*

BENJAMIN B. KNIGHT *et al.*
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the ninth day of February, 1884, in the December term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

BENJAMIN B. KNIGHT *et al.*

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Assumpsit.

Now come again the parties, by their respective attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing the concluding arguments of counsel and re-
33 ceiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit; We, the jury, find the issue for the plaintiffs and assess their damages at eleven thousand eight hundred and eight dollars and fifty-one cents. And thereupon the defendant, by its attorney, moves the court for a new trial herein.

Afterwards, to wit, on the eleventh day of April, in the adjourned March term of said court, A. D. 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

BENJAMIN B. KNIGHT and ROBERT KNIGHT

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant, heretofore entered herein, for a new trial of this cause, and after hearing the arguments of the respective counsel upon said motion the court, being now fully advised thereon, overrules the same and awards judgment upon the verdict. It is thereupon considered and adjudged by the court that the plaintiffs do have and recover of the defendant the said
34 sum of eleven thousand eight hundred and eight dollars and fifty-one cents, their damages so as aforesaid assessed, together with their costs in this behalf expended, amounting to — dollars and — cents, and that they have execution therefor.

On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

35 *Bill of Exceptions.*

In the Circuit Court of the United States for the Northern District of Illinois.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY
a'ts
B. B. & R. KNIGHT.

Be it remembered that on the trial of this cause the plaintiffs gave in evidence on their behalf as follows:

Plaintiffs' Testimony.

E. F. HENDERSON testified as follows:

I live in New Orleans; I am acquainted with Gilbert T. Potter and John J. O'Connor. In the season of 1880 Mr. Potter was a cotton buyer, and Mr. O'Connor an agent of the St. Louis, Iron Mountain and Southern Railway Company; at that time I was in the employ of Mr. Potter, principally marking cotton and sometimes buying.

Q. What is the signification of the letters upon the bills of lading as between the purchaser and the buyer?

Objected to because it is not shown that the railway com-
36 pany knew what the marks me-nt.

By the COURT: If it doesn't bring home to you the meaning of these marks it will go for nothing.

A. The three letter marks—that is, those with nothing around them—stood for strict low or shy middling—any two letters in the block for middling cotton.

Block S. M. stands for strict middling, G. M. good middling, and the marks outside the block indicate the lot.

I obtained my information in regard to the meaning of the letters from Mr. Potter. He classed or graded all cotton, and as he classed each bale made a memorandum on the back with green chalk. I followed behind him with a marking pot and marked the cotton into lots.

I did the marking early in the season, and the marks had the same signification through the whole season. Different persons had the same marks to indicate this particular grade. This standard grade of cotton is middling, and they grade up and down from there; middling is the grade above middle, good middling is a grade
37 still better. Strict low or shy middling is a grade lower than middling. There are other grades of cotton running above. These grades of cotton are recognized throughout the cotton market of the United States, Europe, and Liverpool. On the 10th of April, 1880, I was a marker for Mr. Potter, who at the time was supposed to be in St. Louis; about that time the Commercial Bank of Texarkana failed; Mr. Potter failed also. At that time there were between seven and eight hundred bales of cotton in the possession of the compress company. It was in the compress, on the platform, and in their

yards. The railroad company had tracks running up on both sides of the platform where the cotton was loaded and unloaded. This seven or eight hundred bales of cotton was of a very low grade. I had been in the cotton business since 1874, and understood the grading of cotton; the marks put on the cotton in December, 1879 corresponded with the actual grades of cotton; the marks on the seven or eight hundred bales of cotton on April 10th, 1880, denoted the grades, which were all low grades, below the grades here in controversy; none of the eight hundred bales had any shipping
38 marks beside the grade mark; they had no marks corresponding with these marks prior to April 10, '80; the marks that we put on the cotton would be shipping-grade marks should we have had occasion to sell them, but they were too low for any of the purchasers we had. Mr. Potter had graded all this cotton up and marked it at the time, but none of the shipping marks were put on. My brother had a position as head clerk of Mr. Potter.

A memorandum shown witness, who says it is the handwriting of O'Connor.

On or about April 10th I marked up seven hundred bales of cotton into the marks indicated on the memorandum shown. Memorandum of O'Connor offered in evidence, Exhibit A.

The number of bales in each lot is shown upon the memorandum; the number of bales which have marks corresponding with the marks on the bills of lading is about 525. I am sure there were no marks corresponding with those bills of lading on the cotton when I marked it. I marked the cotton under instructions from
39 my brother; none of that cotton corresponded with the marks put upon it. I did not mark that cotton to correspond with the grade. I did not make any record of the marking up of this cotton. My brother stood by with a list of the marks he wanted put on the bales and as he came up to a bale he said mark it so and so, and I did it. He had the memorandum that has been shown me in his hand. I suppose the compress company was indirectly under the control of the railway; Mr. Martin was the superintendent; the memorandum by which I marked up the cotton came, either directly or indirectly, from Mr. O'Connor to Mr. Potter and from him to my brother; about 50 bales of cotton was attached on the 10th of April, 1880, some of it by George Taylor, of Fulton, and some by the Bank of Paris. George Taylor attached 26 bales; it was marked, but I cannot say what the mark was; the mark was put on that evening or the following day; the cotton that Mr. Taylor attached was bought of him and came into the possession of the railroad company in the early part of April—somewhere between the
40 6th and the 10th, I think; the cotton was marked after it was attached. Mr. Potter had failed at that time. Mr. Potter got his pay by attaching a draft to the bill of lading, negotiating it with the local bank. I cannot say what Mr. O'Connor knew about the different grades of cotton shipped at that time to Mr. Potter. Mr. O'Connor knew that there were different grades of cotton shipped.

Cross-examination:

I went into the employ of Mr. Potter about April or May, 1879, and continued until the failure; during this time I was engaged most of the time in marking cotton in New Orleans, Fort Worth, and Texarkana. I think I was at Texarkana from about the first of July, previous to Mr. Potter's going to St. Louis. I had general directions from Mr. Potter to mark all cotton classed. I did not mark all the cotton that Mr. Potter shipped East; a man named Morbeck did most of the marking, and a man named Gloran did some. I remained there right along till April; from December I was there excepting a few days that I was sick; the railroad
41 or the compress company had nothing to do with the marking, which was all done by Mr. Potter up to the first of April; Mr. Potter classed the cotton and gave me specific directions how to mark it; no one else had anything to do with it up to the first of April; Mr. Potter left Texarkana between the 6th and 8th of April, and I do not know that he ever came back. I marked up after Mr. Potter went away all that he had there—between seven and eight hundred bales—and the whole business was closed up; all the cotton marked at that time was shipped over the defendant's road; when Mr. Potter left Texarkana he left Mr. Stewart in charge of his business; Mr. Stewart's office was at the compress office; Mr. Potter, my brother, and myself also made our headquarters there; the cotton that I marked this time had the grade marks on it. I think all of those 700 bales were at that time marked in some way. I think I put on the marks that were on the cotton when I did the final marking, about the 10th of April; by the directions of my brother I changed the marks from what they had been to
42 something else. I had previously marked them with the proper marks, and made the changes by direction of my brother, who was head clerk for Mr. Potter. Mr. Potter graded that cotton before it was originally marked. The marks indicating the grade were on the cotton on the 10th April, when we put on the marks to correspond with the bills of lading. We did not mark the cotton with any regard to the quality of the cotton that was in the bales, but made it conform with the bills of lading. I knew at the time that the cotton was all of a low grade. It was all marked. I erased the former marks and put on new marks. The former marks were put on with ink and the marking-brush, and I erased them by running a brush through them which blurred them. I knew this six or seven hundred bales of cotton on which I changed the marks was of an inferior grade, because I marked it. Mr. Potter graded it and I marked it as I was told. The grading was done in the grading-yard. The cotton was delivered at the compress; it was turned out and laid down with the sample end up, so as to
43 sample the cotton. Mr. Potter passed along sampling it, marking the grades. I followed behind with ink so it would not be erased. I marked this cotton in part of a night and in the morning. I did not hurry the marking, because I had learned that the cotton was going to be attached, for I knew nothing about it;

there was cotton enough in the the yards to fill the amount of the marks. I knew all the marks of the Knights and the other houses. I knew where every bale was going. From December to April Mr. Potter had been selling out, marking and sending off all the different amounts of cotton that he would buy; this amount of cotton was the residue or refuse of what he had bought during the entire season: the original marks on this cotton were S. O., S. G. O., and L. O., the three lowest grades he handled. S. O. means strict ordinary; S. G. O., strict good ordinary; L. O., inferior. I had no directions except to mark the cotton bale by bale. We wound up the whole business. I knew that Mr. Potter had just failed. I am sure
26 bales of the cotton was attached before it was marked. I
44 think I marked the cotton on the evening or night of the
10 of April. Potter had given no instructions about marking it. I think the cotton was attached on the 10th. I had no conversation with Mr. O'Connor in regard to the cotton. My orders came from the head clerk, my brother. I cannot say positively what Mr. O'Connor knew about the different grades of cotton shipped, but he knew the grades that went to certain parties.

Redirect examination:

I originally marked all this cotton and afterwards remarked it. I knew the grade of the cotton independent of the marks which Mr. Potter placed on it. I knew the grade of the cotton because I had sampled a good deal of it.

The cotton is never removed from the original bales in which it is put by the planter, and the covering is not taken off. It is simply reduced to a smaller compass. The cotton is covered with bagging or other cheap material, having about six bands around the bale with planter's mark on the end. I am a judge of cotton, and
45 I examined some of this cotton. To examine cotton they cut the bale across the top, opening and pulling out a sample weighing from two to five ounces.

This fixes the grade and shows if there is any dirt or trash in it and shows the color. A person who is not experienced in the business cannot judge of and be able to distinguish the different grades of cotton. The shipping marks are put on before the cotton is compressed. This cotton was compressed at or about the time that I marked it. The original marks which I eraced had been put on before it was compressed. The cotton is marked for shipping before it is compressed and not after. In this instance it was already compressed when I marked it up.

J. M. HENDERSON testified as follows:

I live at New Orleans and am acquainted with G. T. Potter and John J. O'Connor. During the season of 1879 and 1880 I was weighing cotton for Mr. Potter; some of the other clerks were under my instruction. I employed and managed the labor and paid them myself.

(Witness here identifies memorandum marked "Exhibit A.")

46 I got this memorandum from T. L. Martin, superintendent of the compress; it is a memorandum of short cotton; when I received it from Mr. Martin he requested me to have that cotton marked up. Mr. Martin was paid by the railroad company and attended to the railroad bills of lading and all classes of bills that the compress company was supposed to pay for. Mr. Martin requested me to mark this cotton up. At the time there had been an attachment served; Potter had failed and the bank had failed, and the compress was about to close for the season. The cotton was all compressed except a few bales; most of it was lying on the railroad platform—some few bales in the warehouse. Potter was in St. Louis. I could not get any information about the cotton from him, and I just marked it up to get rid of the whole thing. Mr. Martin had no right to order me to mark the cotton, but I marked it to oblige him; the old marks were rubbed off and the new marking [was] done by my brother, E. F. Henderson, under my direction, and it was all shipped. I had the memorandum with me at the time and have

47 kept it ever since; there was something over five hundred bales represented on this memorandum. I wasn't the marker for the house, and when Mr. Potter was present he gave the directions as to the marking. I cannot say that Mr. O'Connor knew the marks for the different grades of cotton; he never told me that he did. I think the railroad people knew about the marks, from a small memorandum I have; on this memorandum the mark two bales; S. M. B., in a block, means S. M. Barry, one of Mr. O'Connor's head clerks. I went to Texarkana in the fall of 1879. I was familiar with marks used on these bills of lading. When I wasn't busy doing other things I occasionally called the marks. Two letters in a block mean low middling; S. M. in a block means strict middling. Mr. Martin told O'Connor when he demanded the cotton that he was going to have it marked up and delivered to him; he as much as intimated if I did not mark it he would. I only knew the relation of the compress company to the railroad company from my surmises and general information; the railroad company delivered the cotton to the

48 compress company, who compress it and deliver it on the other side of the compress to the railroad company. They were supposed to deliver it behind the compress and receive it on the other side. I don't think the railroad really run the compress itself. The cotton was not all marked when it was attached by Taylor. It was marked Satuday night and Saturday with the marks on the list. Nobody told me to mark it at night, but I wanted to get through with it. This cotton was of a low grade. A very few bales of the cotton was compressed pickings. I had no instructions from Mr. Potter to mark it up. The shipping marks are put on the cotton before it goes to the compress. The compress company had a warehouse covered over and sheds all around it, and platforms from the railroad, with railroad tracks on two sides of it. The tracks were supposed to belong to the compress company. The cotton that was attached by Taylor came from Fulton, Arkansas, early in April. It was not bought in the latter part of December, 1879.

Cross-examination:

49 In the latter part of October, while at New Orleans, I got a telegram from Potter offering me a position in Fort Worth, Texas. In the middle or latter part of November I went to Texarkana and stayed there until he failed and some little time afterward. When I wasn't very busy I did a little of everything—occasionally wrote letters, sometimes made out bills of lading, and helped the markers or anybody else who needed help. Potter and Stewart made out the most of the bills of lading. The cotton came from different points, and was classed when it was delivered to the compress company, after it was put in the compress warehouse and before it was actually compressed. The bills of lading were signed and drafts drawn before the cotton was delivered to the compress company. The cotton was not received in Texarkana when the bills of lading were signed and given; we were filling them up all the time. The bulk of the bills of lading were made out by Potter and Mr. Stewart, who was Mr. Potter's book-keeper and cashier. When the bulk of the bills of lading were made out and signed we hadn't any cotton in the warehouse to class or mark up.

50 The cotton shipped by the railroad, and afterwards to Europe, was not on hand when the bills of lading were signed; the cotton called for by the bills of lading dated December 20th, December 22nd, December 23rd, and January 3rd, was not on hand when the bills of lading were signed—that is, it was not classed, ready to ship, marked, and in the compress; an odd number of bales were in the hands of the railroad company. They had a like number of bales represented by their bills of lading; the seventy-four bales of cotton called for by the bill of lading, dated December 5th, was not marked when the bill of lading was signed. I do not know whether the cotton itself had been delivered to the railroad company; the cotton came in principally over the Texas Pacific railroad, to be delivered to Potter or his order; the cotton never came into Potter's possession; it was delivered at the compress; when Potter bought seventy-four bales of cotton down the road he would get a local bill of lading signed by the Texas Pacific. We then made out a bill of lading for the seventy-four bales,

51 went to O'Connor, and gave up the local bill of lading, and he would sign a bill of lading for the same amount of cotton; the bill of lading was signed before the cotton supposed to represent that grade was marked at Texarkana; the local bills of lading came in before the cotton did. Potter gave me no instructions before he left. He said he was going to St. Louis to buy cotton, and that as soon as he got cotton bought and could do so he would send for me to work for him. He left Mr. Stewart in charge of his office. I had charge of the weighing and sampling and employing. I think no cotton came in after Potter left, but there may have been a few scattered lots. I marked the cotton up upon the direction or request of Martin, as I thought he would do so if I did not; some of this cotton that I marked up on the 10th of April had been there a good while. I marked up the cotton a very short time after I

received the memorandum. I didn't agree to mark that cotton until the time of the sheriff's levy. Mr. Martin agreed with the sheriff that he would hold everything in *statu quo* until
52 Monday morning. I marked the cotton on Saturday and Saturday night. I didn't care who got the cotton and didn't have anything to do with attaching creditors. I didn't know anything about the grade from looking at the cotton itself; all I could tell was by the shipping marks, which were not dry and could be rubbed out entirely. If I had attempted to fill up this memorandum with the grade of cotton the marks represented I wouldn't have marked a bale, because there wasn't any cotton there of that grade—it was all gone; some of the cotton was represented by dray tickets; Potter couldn't do anything with the cotton except to classify it; the cotton was consigned to Potter or order and the local bill of lading was exchanged for one signed by the agent before the bank advanced money on the through bill of lading. There are from four hundred and fifty to 700 lbs. in a bale of Texas cotton; it averages about 550 lbs. There was a great deal of cotton on hand the latter part of December for which bills of lading were given that
53 corresponded exactly with these marks. Mr. Potter classed all the cotton himself, and usually stated which way he wanted the mark put on; the shipping marks were put on by his marker under his direction. Prior to the 10th of April there was no cotton sent forward by the railroad which did not correspond with the marks on the bills of lading.

HENRY A. FIFIELD testified as follows:

I live in the State of Rhode Island; my place of business is at Providence; my home is at Centerville; I am a clerk in the employ of B. B. & R. Knight and have charge of their cotton and cotton cloth. From the highest to the lowest grades of cotton there are about fifteen grades; four grades are indicated in these bills of lading, from strict low middling up to good middling; low grade is middling; the other grades are above and below; strict middling is a half grade above middling, and good middling is a whole grade above middling; low middling is a half grade below middling. I do not call myself an expert, still I have a good knowledge of the grades of cotton. Out of some 5,000 bales of cotton which the Knights
54 had purchased of Mr. Patter and which were shipped over the Iron Mountain railroad, and for which we had bills of lading, we were some 800 bales short. Nearly all of these bills of lading were dated December, 1879, and about the first of April, three or four months after the bills of lading were issued, they became very anxious, for the cotton represented a good deal of money. The cotton was worth from $50 to $60 a bale. I left for the South in May or the middle of May, and just before I left 525 bales of this shortage came in. Before I left I ascertained that the grade of these 525 bales was not of the character represented in the bills of lading. It was received, sampled, put in the store warehouses, and the railroad company notified. All the cotton previously received, excepting this 525 bales, was all right and corresponded with the bills of

lading. When I left home after receiving these 525 bales we were still short 140 to 150 bales which could not be accounted for. While
55 I was away the railroad found they could not find any trace of it and paid me for 86 bales, most of which were shipped from the station of Hope, Arkansas, and which never came to hand. This was not of this lot of cotton. I went to St. Louis and there saw Mr. Frink, the general freight agent of the St. Louis, Iron Mountain and Southern railroad. He made out a complete list of our shipments for the season, showing the dates of the bills of lading, dates of the shipment, and tracing every bill, except what they could not find. I have the statement or tracer that I received from Mr. Frink; they are in Mr. Frank's handwriting.

(Witness identifies these documents as "Exhibits B & C.")

Part of the cotton in question is shown on these tracers.

Every bale of the cotton in question was shipped from Texarkana after the *the* 15th of April, 1880. 150 bales marked R. O. V. left Texarkana on April 15th and 16th, just four months after the bills of lading were signed, under date of December 16th. Under date of December 23rd there were seven bales marked block, [G. M.] S. S.; 60 bales, [S. M.] S. S., and 100 bales marked X X D;
56 167 bales in all. I find the whole 167 bales left Texarkana after the 15th of April. The next bill of lading, dated January 2nd, for twenty-two bales block [S. M.] K. outside, I find these left January 15th.

Bill of lading, December 20th, for cotton, marked P. P., I find 17 bales left April 15th and 22 bales hadn't left at all when I was there. I think that covers the whole, although the number of bales I have given here don't cover every bale in the bills of lading; simply covers the bales in question—some of it came along; twenty-six bales were attached on the 10th of April. I replevied them at the time, but we lost the suit and had to pay for them; this statement is made from the tracer I got from Mr. Frink; when in St. Louis, and after Mr. Frink had paid me for the cotton that he claimed they had never received, I made him a verbal statement about these 525 bales of inferior cotton.

He told me to go to Providence, put the statement into writing, and, if what I said was true and could be proven, they would be
57 just as fair in settling for this inferior cotton as they had for the cotton we had not received. I made the statement in a letter of April 27th, and they finally refused to pay. The marks on the bills of lading indicate the different grades as agreed upon by Mr. Potter and the Knights; the mark indicating the grade of strict low or shy middling was composed of three separate letters, like L. D. R., R. O. V., X. X. D.; the grade of middling was represented by three letters or two letters in a block; strict middling is represented by the letters [S. M.] in a block with a counter-mark outside; good middling was represented by [G. M.] in a block. I was away from home on my trip to St. Louis about one month; the cotton received by our company from Texarkana was of such inferior quality that we could not use it in the manufacture of our goods.

It was advertised and sold at auction on account of whom it may concern; notice was given to the railroad company of that sale; the cotton was sold for all it was worth; there was no trouble with the staple of the cotton; it was simply as to its quality; the grade
58 and staple are two different things; this was very low grade. I received this cotton at the depot, examined it, and arranged it in the auction room for sale; there was 525 bales less 26. We had to pay for the 26 bales, because we were defeated in the suit. I have made a statement of what that cotton sold for.

(Objected to on the ground that it is not reliable and not the proper rule of damages.)

For the 525 bales we paid the sum of $34,064.82, which was the contract price for the bales which are missing or which did not correspond. We gave the railroad credit for 499 bales; we did not give them credit for the 26 bales we settled for.

We gave them credit for $15,962.64; there was added for storage and insurance and expenses of sale $652.22; the deficit, without interest, is $8,246.96, the deficit, with interest at six per cent., is $12,052.02; the amount of interest is $2,905.06; the rate of interest I compute on the amount paid for drafts thirty days after the date of the bill of lading; I allow for a reasonable time for the
59 cotton to get there—to September 1st; then I compute the interest from the date of the auction sale up until to-day. I am acquainted with the markets in Providence at that time, and the cotton sold for all it was worth there; it ordinarily takes cotton from fifteen to thirty days to come from Texarkana to Providence; it ought to come in fifteen days; the cotton was paid for by paying a draft attached to the bill of lading, which was presented to us through the bank; all of the cotton represented by these bills of lading had been paid for; all of the cotton except the 525 bales shipped after April 10th was of the grade indicated by the bills of lading; the universal custom among cotton-spinners is to pay drafts attached to bills of lading representing cotton.

Q. State whether or not any reliance is placed upon the statements in the bills of lading of the mark.

Objected to.

By the COURT: He may answer I will reserve the question.

A. We would not have paid the drafts had they not been attached to the bills of lading. We judge of the character and grade
60 of the cotton by the bills of lading; we received these invoices explanatory of the bills of lading as early as we did the bills of lading. We would not pay the bills of lading without knowing what kind of cotton it was. Potter is considered an expert in grading cotton; we never found any fault with him.

Cross-examination:

We got an equal number of bales of cotton to that mentioned in the bills of lading, with the exception of the cotton that was attached.

I relied upon the schedule furnished by Mr. Frink to determine when the cotton left Arkansas. The cotton that was attached left Texarkana some time after the first of June. I think it arrived in Providence on the 23rd of June. I replevied the cotton and gave bond which released it and sent it on to Providence. Mr. Frink told me to go home and make a statement, and he would be fair in settling, if he found, upon investigation of the facts, that they were liable. After I furnished the statement he investigated and informed me that they declined to pay; we paid the freight on this cot-
61 ton and it is not included in the account I have shown. The invoices sent with the bills of lading included the freight, but the drafts did not. Potter was selling us the cotton at a price delivered in Providence, which included the freight. The amount of the freight and the amount of the drafts represented the cost of the cotton. The amount given as the gross cost of the 525 bales, $34,064.82, includes the freight. The invoices showed the number of bales, the prices, and the amount of freight; the marks indicated the grade of the cotton—it wasn't written on the bill of lading, but we understood it.

The invoices were made by Mr. Potter's employees. There was an understanding with Potter and us as to what the marks put on the cotton should indicate. Potter had told us in the beginning how he would mark cotton to indicate the different grades. We had bought cotton of Potter one year previous.

The mark- signified the same as they had the first year. I know when 17 of the bales marked [P. P.] on the bill of lading, dated December 5th, 1879, left Texarkana, by Mr. Frink's tracer.
62 All of the invoices sent us by Patter did not contain the weight of the separate bales. In the case of the 525 bales I believe none gave the separate weights. Before that time I believe the weights had been given. The invoices were sent to us by Potter when he drew on them. I think in almost all cases the invoices arrived before the drafts were paid. The drafts passed through two or three different banks. I have the invoices of the cotton concerned in this suit with me.

(Invoices offered in evidence.)

In the first of the season it is customary for shippers to send by express specimens or samples of cotton to show the character of the cotton before the drafts are paid; this was done with some of the shipments that were all right and it was not done with others. We had from Mr. Potter during the season what is called a set of types of cotton. He said: The cotton I send you as middling will be equal to that type. We don't, as a rule, examine or care to examine all the different samples. We rely upon the samples furnished
63 us at the beginning of the season. I cannot tell when in the season of 1879 and 1880 we received the last sample of cotton. I believe the only cotton at Texarkana when I was there was the 26 bales that were attached. I believe all the rest had gone forward; the 525 bales had arrived in May before I left home, and I at once discovered its inferiority. We put it into a warehouse, and I notified

the company when I went out there; the matter was talked over by Mr. Frink and myself; there was not the slightest difficulty in discovering the inferiority in the grade of this cotton when it arrived; the principal brand of goods manufactured by our mill is the Fruit of the Loom. We use cotton of the middling and higher grades; the cotton which we received could not be used in our business.

ALBERT J. WINSOR, deposed as follows:

I am a cotton-sampler in East Providence, Rhode Island. About three years ago, at the request of Henry A. Fifield, I sampled some lots of cotton which were afterwards sold at public auction by B. B. & R. Knight; in sampling cotton I cut the bale and put my hand in as far as I can, and I have a sampling-iron which I use if
64 I can get it into the bale and pull out what cotton I can; this lot of cotton was what I call strict ordinary or low middling.

Cross-examination:

I distinctly remember sampling this lot of cotton at the Providence & Worcester railroad depot.

JAMES P. RHODES deposed as follows:

I am and have been a cotton broker for eighteen years. I live at Warwick, Rhode Island. It has been my habit as a broker to examine and judge of the different grades of cotton for several years. I have frequently been called upon to judge and arbitrate as to the different grades and quality of cotton; at the request of Henry A. Fifield I examined samples of the cotton in dispute in these cases some two or three years ago, which was afterwards sold at auction in Providence by B. B. & R. Knight; this cotton was graded from inferior to good ordinary, and I think there might have been a few bales of strict good ordinary. I think there were no bales of good middling, strict middling, or shy or strict low middling.
65 I was not present at the auction. I think from 9 to 9⅝ cents per pound would be all that this cotton would be worth.

Q. Is there any recognized method or general custom of doing business in Providence or in the New England States between cotton mill owners, dealers in cotton in the South or Southwest, with reference to the payment for cotton and the time and manner of payment and with reference to its delivery? If there is any such custom state what it is.

Objection. Question objected to as incompetent even if such a custom does exist.

A. There is; the cotton is shipped and drawn again with bill of lading attached—bill of lading and invoice; the invoice should state the number of bales, the marks, and grade, and the bill of lading will be accompanied with a sight draft; these drafts are paid before the cotton arrives and have nothing to do with the delivery of the cotton; the buyer looks at the bill of lading for the delivery, which

is made, as a matter of fact, some time after the payment of
66 the drafts. I do not understand that there is any general custom as to construing the operation and effect of the statements in the bill of lading; buyers of cotton frequently arrange with the sellers that certain letters in a bill of lading shall indicate the quality of the cotton.

Q. State whether or not, in such cases, the buyer, on paying the drafts attached to such bills of lading, do or do not rely upon these letters as indicating the quality of the cotton.

Objection. Objected to as not being a proper question on which to found the expression of an opinion.

A. They would.

Q. State whether or not such is not the custom of yourself and of others in the business.

Objected to as incompetent.

A. If it was my agreement I would, but it is not my custom; I do not buy cotton that way.

Cross-examination:

I examined this cotton in Mr. Knight's office from samples furnished me by Mr. Fifield. I formed an opinion of the whole from
67 the samples furnished me. In the trade there are about fifteen grades of cotton that have names. Middling is the standard; good middling is two grades above; all are graded above or below middling. The invoice is usually mailed, while the bill of lading comes through the bank. Where a purchaser had agreed with the seller that certain marks be put upon the cotton to indicate the grade, and same marks were placed upon the bill of lading, the buyer, in paying the draft, would rely on such marks as indicating the quality of the cotton, as well as on the good faith and honesty of the shipper. The purchaser would not pay the draft unless he had confidence in the man he bought it from.

HENRY A. FIFIELD, recalled, states that the cotton with reference to which the witnesses Winsor and Rhodes testified in their depositions was the identical cotton in question in this case. The cotton sold from nine to nine $\frac{5}{8}$ cents per pound.

68 *Defendants' Testimony.*

The defendant read in evidence the deposition of Gilbert T. Potter; to the reading of which the plaintiffs objected, but the court overruled the objection and plaintiffs excepted.

GILBERT T. POTTER deposed as follows:

I am a cotton buyer and lived at Fort Worth, Texas. The bills of lading in this case are signed by John J. O'Connor, agent at that time of the St. Louis, Iron Mountain & Southern railway at Texarkana. I received the bills of lading in this case from him; at the time of receiving said bills of lading I put in the possession and

control of the railway company the number of bales of cotton for which the bills of lading were issued; all the bales of this cotton were not at that time marked as designated in the bills of lading; at that time I had sold a large quantity of cotton—several thousand bales—and had bought a large quantity to cover said sales, to be delivered to me at various times; when these bills of lading were signed the market had already advanced from $12 to $15 per bale.

69 The railroad had in their possession from three to five thousand bales which was not accessible. In order to take and pay for the cotton which I had bought it became necessary to utilize the cotton already bought and not accessible. The railroad was unable to deliver for classification and marking because of the scarcity of cars and from other causes. Mr. O'Connor agreed to sign the bills of lading in question, and the cotton was to be classed and marked as soon as it could be delivered to me for that purpose. When the cotton came to be classed it was found that it was not as good in quality as bought for by me; all there was of the proper quality was marked and forwarded by the railroad; it was then arranged that the balance should be marked in as soon as I could buy cotton of that quality. I think this agreement with O'Connor involved about three thousand bales; the marks were filled with proper quality with the exception of about 500 bales. About April 6th, 1880, I left Texarkana for St. Louis for the purpose of buying cotton; in a few days after this the house of Dodge, Potter & Co., in New York, with whom I had intimate relations, failed;

70 about this time 50 bales of cotton were attached at Texarkana by George Taylor, of Fulton, Arkansas; about the same time I received word from my book-keeper at Texarkana that Mr. O'Connor demanded the immediate marking up of cotton sufficient to supply the number of bales short on said bills of lading from the cotton in possession of the railroad company and held to cover the same by it. I protested against the marking of the cotton to Mr. Stewart, my book-keeper, who came to St. Louis in consequence of Mr. O'Connor's demand. Mr. Stewart stated that O'Connor said that unless the cotton was marked immediately he would have it done himself; the next thing I heard was that the cotton had been marked and forwarded. I did not mark the cotton or consent to its being marked. The cotton was not of the quality bought for the plaintiffs in this case. I marked up all the cotton from time to time that was of the proper quality and as fast as the proper quality could be bought. Mr. O'Connor kept a running account of the marks on the short numbers, and when any cotton was marked in to supply the amount short on these bills of lading he released an equal amount of cotton inferior in grade. He held from

71 me an equal number of bales of cotton of all grades to cover the number he had signed bills of lading for; I mean of all grades—all except the grades called for by the bills of lading. All of these grades had been marked in. Mr. O'Connor understood the facts as I have stated them; the marks on the bills of lading indicated the grade of the cotton. I could't say positively that Mr. O'Connor knew that they indicated the grades of the cotton; the

marks for the most part showed for themselves; thus good middling was marked G. M., with a countermark to distinguish the different lots; strict middling was marked S. M., with a counter-mark for the same purpose. Mr. O'Connor knew that fine cotton was called for by these bills of lading, and that the reason for delay in completing the marking was because the cotton on hand was of lower quality. I think he had a general knowledge of what the mark signified; it is customary in the South, in order to receive the money for the cotton sold to attache drafts for the value of the cotton to the bills of lading, which the banks cash, less discount. Mr. O'Connor knew that I got my money in this way; there was, in the season of 1878 and '79 and the latter part of the season of '79 and '80,
72 an agreement or understanding between myself and the railroad company to induce me to make as large shipments as possible over the road.

Cross-examination:

I commenced doing business in Texarkana in October, 1879; for six months thereafter I bought cotton heavily in the vicinity of Texarkana for shipment East. I bought and shipped to other parties besides the plaintiffs in this case. I think I had about 5,000 bales of cotton on hand during December, 1879, at Texarkana. I had a regular system of marks indicating the grade with which the cotton was marked after being unloaded, sampled, and classed. I used these marks for all the cotton I purchased during that season, with very few exceptions. During that season I usually applied to the railway company for bills of lading as soon as the cotton was delivered to me at the station at Texarkana, because I had cotton already marked up and ready to ship, and when I put them in possession of an equal quantity of cotton they signed the bills for that marked. The bills of lading were always drawn by my
73 book-keeper and clerk. As to the bills of lading in question it was understood that the cotton was not marked, but would be as soon as the railway could deliver it for classification and marking. All the cotton I purchased during that season was compressed at the expense of the Iron Mountain road and under their direction, with the exception of about 15 bales; the cotton was compressed by the Texarkana Cotton Compress Company, of which T. L. Martin was superintendent; as a rule, the cotton was marked before it was compressed. Fenner Henderson and T. Morbeck, in my employ, marked my cotton. The bills of lading were issued in triplicate. I don't recollect seeing the marks O. K. at that time. I had a special arrangement during that season with the plaintiffs as to what grades of cotton the marks on the bills of lading would indicate. I don't think there was any detention on account of an accident to the compress amounting to more than a week at any one time; none of my cotton was attached, except 50 bales on about April 10th. I bought some cotton of the quality designated by the bills of lading after the bills of lading were signed.
74 This cotton was forwarded to the plaintiffs. The cotton referred to as inaccessible was classed and marked as soon as

it was delivered to me by the railroad company for that purpose. I did not buy enough cotton of the proper quality to meet the amount for which the bills of lading had been issued. The marks on the bills of lading only indicated the grade of the cotton, but it was understood that the staple was to be of a certain quality. I think a few small lots of very extra samples were designated by mark. I protested against the marking up of the cotton in April, because the cotton available for marking was inferior to the quality I agreed to send and what the bills of lading called for.

Originally there were bills of lading signed for about three thousand bales of cotton which was inaccessible and could not be classed and marked. All of the proper quality of such cotton was marked and forwarded, and additional amounts from time to time, as it could be bought, reducing the deficiency, on April 10th, 1880, to about 500 bales, which amount re-resented the demand of
75 Mr. O'Connor, and covering which he held an equal amount of cotton inferior in quality to what the bills of lading called for. I was absent in St. Louis at the time, and don't know who marked the cotton up. About this time I failed in business myself. I have made no settlement of these claims with the plaintiffs. Cotton of the proper quality was shipped to the plaintiffs as fast as it could be made ready, by classification, marking, and compressing. Some would go through in twenty days, some in 30 days, and some in 60 days.

JOHN J. O'CONNOR testified as follows:

I live at St. Louis. During the winter of 1879 and '80 I resided at Texarkana, Arkansas. I was freight agent for the St. Louis Iron Mountain and Southern Railroad Company; also freight agent for the Texas Pacific, at Texarkana. The deviding line between the two States is the center of the track running north and south. The cars on both roads run into the same station, but the railroads are entirely separate and distinct. At that time the southern terminus of the Iron Mountain road was at Texarkana. There were two branches of the Texas Pacific: one, from Texarkana to Fort Worth by way of Marshall, Texas, that was directly south; the other, the Trans-
76 continental Division, went directly west towards Sherman, Texas. Unfortunately I do know G. T. Potter. He was a cotton buyer. He bought a portion of the cotton near Texarkana and hauled it to the town in wagons. Later in the season, during December and January and later, the bulk of his cotton came in over the Transcontinental Division of the Texas Pacific road. When the cotton came in over the Texas Pacific it stopped at the compress, was unloaded there, and delivered to D. T. Potter, or rather delivered to the compress company, as there was his delivery place, where all the cotton should be delivered to the compress company. Both the Texas Pacific and the Iron Mountain railroad had tracks to the compress. There was another railroad track there from the Texas and Southern Narrow Gauge, which runs from Texarkana to Tyler, Texas. The Iron Mountain road has nothing whatever to do with the latter road. The compress company was a separate institution,

and did business under a corporate charter. The custom in managing the cotton business at that time was the same as it is now.

77 The railway company received the cotton for transportation east. In order to lessen its bulk the cotton was shipped to the first cotton compress; for instance, at Atlanta, where there was no compress, the cotton was shipped to the compress at Texarkana. As fast as the cotton was received there it was delivered to the compress company for compression. If it was this Potter cotton it was sold at the compress, because that was his place of business. He had an office there where he handled the cotton and did all his work. The warehouse was a very large frame structure. The cotton is compressed in order to give the shipper a cheaper rate. From 20 to 32 bales of uncompressed cotton will fill a car. When the cotton is compressed the same car will contain from 40 to 60 bales. It will double the carriage capacity of the car in that way. Thus the shipper gets cheaper rates and the railway carries more in its cars and increases the revenue. Cotton was received at the compress by wagon and the three different lines of railway I have mentioned. The cotton came consigned to G. T. Potter. It was delivere- to the compress because Mr. Potter instructed it to be delivered there. It was his cotton and we delivered it to him.

78 He arranged with the compress company how they should handle it for him. The railway company had no interest in it until he asked us to sign bills of lading going east. I kept a copy of every bill of lading. Before December I notified Mr. Potter personally that I would not in the future sign any bills of lading unless I took a guarantee from the compress company that the cotton was actually as the bill of lading called for. I wouldn't allow the marks to be obliterated or changed. Every one of the bills of lading signed after that, every one of these bills in question, had a guarantee of the compress company on it. In December, 1879, the compress was very badly crowded. The capacity of the compress was stated to be about 600 bales per day, but I think they averaged about 350 bales per day, which was not half the amount of cotton received during that time for compressing. In other words, the compress company's daily receipts for same time, [were] twice the amount of their average compressing. The result of this was, the compress was piled up with cotton. I think at one time there were 5,000 bales of cotton in the compress company's warehouse. This accumulation of cotton was not compressed. There were no other buyers of cotton at Texarkana at that time, but other cotton came

79 there to be compressed as well as Potter's. This other cotton was subject to the same delay. Most of Potter's cotton came in over the Texas Pacific. He had at one time several hundred bales from Fulton, Arkansas, a town several miles north of Texarkana, which came consigned to G. T. Potter, and he had to pay the freight; aside from this, the Iron Mountain did not deliver to him any other cotton whatever for compression. I had no arrangement whatever with Potter about the issuing of the bills of lading. I would have the marks certified to by T. L. Martin, the superintendent of the compress company, and then I would sign bills of lading

on that certificate. Don't know who marked the cotton. I marked none of these bills of lading that I know of. I was well posted as to the amount of cotton going into the compress by looking over the books of the Texas Pacific to see that the requisite number of bales were there. The bills of lading came to me guaranteed as a correct memorandum. I was a stockholder in the bank, and was chairman of the investigating committee after the failure. I found
80 that Potter from some time in December had overdrawn his bank account all the way from $5,000 to $35,000 at a time, and the conclusion that the committee came to was that Potter and the cashier of the bank were in *conclusion*. I did not see the cotton when the bills of lading were issued. I simply made it a rule to allow none of the clerks to sign for the cotton until certified as to its correctness; that was up to December, 1879; after that date I signed every bill of lading myself, and thre-ten*des* to discharge any clerk — that bill of lading. I have copies of every one of these bills of lading here now. The originals were made out out by G. T. Potter. The O K, on the bill of lading, dated December 20th 1879, is in the handwriting of the superintend*de*- of the compress company. I would not sign the bills of lading until Potter got the signature of the superintendent of the compress company; some of the cotton was detained in the compress 90 days. The bulk of the detention was right there in the cotton compress.

The cotton come in so fast that some of it went from the receiving platform into the warehouse and was piled up. The cotton
81 *then* came in first went out last; that piled up in December lay there until March or April. From time to time there was a detention on account of breakage in the machinery; at one time a whole week. The busy month in the cotton business is generally December, sometimes November. It depends upon how the cotton ripens. I had no arrangement whatever with Potter how these bills of lading should be issued. I had no understanding with Potter about the marks on the bales. I did not know at the time what the marks indicated. I never knew what they indicated. I had no knowledge of the quality of the cotton. I never saw a stalk of cotton growing until I went to Texarkana in 1877. I never heard that the marks upon the bills of lading had any connection with the grade of the cotton until that winter. In November of that year I heard talk of Potter's system of marking cotton. It was an arrangement with his consignees. I did not know what the marks on the particular bales indicated. After these bills of lading were signed I did not know of any change of the marks on the cotton represented by them. My office was located about a quarter of a mile from the compress. I signed the bills of lading at my office and not at the cotton compress. I wasn't there to look at the cotton. What I
82 did I did upon information from my record and my clerks. When these bills of lading were signed the cotton was in possession of the compress company. I signed the bills of lading as soon as they were certified to by the superintendent of the compress Co. and brought to me by Mr. Potter or his clerk. After the cotton was compressed there was very little delay in loading it into the cars

that were to take it East. The great delay was in the compress building. The railway company took charge of the loading after it was compressed. The cotton after it was compressed was placed on the loading platform and we loaded it into the cars. Mr. Potter asked me several times to retain cotton. I don't think Potter had anything to do with the delaying [of] the cotton in question. I sent several statements to Mr. Martin showing the amount of cotton that was represented by the bills of lading that I had in my possession. We required him to see that the cotton was at the compress and was ready for us to load and have the bills of lading made out, and to notify us what marks that cotton had. I had no control or supervision of the superintendent of the compress company. He
83 was not obliged to honor my instructions or those of the railroad company. He did not receive his pay from us. The compressing of the cotton was taken out of the railroad company's rate. I knew nothing whatever of my own knowledge of the quality or grade of that cotton. I knew from our records how much cotton was in the compress, but I never counted it personally. I had no control of the inside workings of the compress at all. I did not know the cotton was marked otherwise than as shown by the bills of lading. The railroad company had nothing whatever to do with the cotton from the time it was delivered to Potter and went into the compress down to the time it was placed on the loading platform. The loading was done under my directions by my clerks, who were instructed to have the marks conform to the shipping ticket. In no instance did the railroad company know anything about the grade or quality of the cotton. I found out the number of bales in the compress and had the marks on them certified to by the compress company before I issued bills of lading. The railroad company neither directed or had anything to
84 do with Mr. Martin's marking the cotton. I know that the same amount of bales was forwarded from Texarkana that the bills of lading called for. I did not know that the cotton was in there when I sent in the statement, and demanded that the cotton should be loaded up. I did not know any change in the marks of the cotton was made only by what I have learned since. The way-bill is dated one day ahead. If the way-bill is dated to-day the cotton would have been loaded yesterday. Out of the 74 bales marked P. P. in block in bill of lading, dated December 5th, forty-two bales were forwarded December 24th, 1879, eight bales on December 28th, twelve bales on December 30th, four bales on January 4th, and eight bales on March 22nd. On the bill of lading, dated December 16th, for 174 bales marked R. O. V., 31 bales were forwarded April 8th, 1880, 141 bales on April 14th, one bale on April 15th, and one bale on June 5th. On the bill of lading of December 20th, calling for 115 bales, 55 bales were marked P. P. in block, of which three bales were forwarded December 29th, 13 bales on January 8th, 17 bales on April 15th, and 22 bales on June 4th, 1880. The thirty-nine bales of this lot shipped after April 10th are
85 low grade. On bill of lading, December 22nd, for 200 bales, 40 bales were marked [G. M.] in block, S. S. outside, of which

eight bales were forwarded December 30th, two bales on January 4th, 20 bales on January 23rd, three bales on February 8th, and seven bales on April 15th. Sixty bales of this lot were marked [S M] in block, S. S. outside; of which four bales were forwarded December 29th, ten bales on December 30th, two bales on January 4th, and 44 bales on April 14th, 1880. The dates of shipment from Texarkana given in the schedule of Mr. Fifield are substantially correct. I was freight agent at Texarkana of the Iron Mountain road, and they had a ticket agent in addition. My particular duty was to see that such freight as reached there from the North was forwarded to the South, and such freight as reached there from the South was immediately forwarded to the North. It was a large transfer station. I believe every one of the bills of lading in controversy were signed by me in person. One of the bills of lading—that one dated December 5th—was not O K. The cotton for this bill of lading was marked [P P] in a block, and every one of those 74 bales left before the 23rd of March. Seventeen bales of this lot made
a part of the 525 bales. I have no authority to make rates of
86 freight. The rates were made exclusively by the general freight agent, whose office was in St. Louis. I was furnished with a copy of the new rates when there was any change. There is no difference in the rate of freight between good and poor cotton. The only difference made is between compressed and uncompressed cotton. The marks on the cotton and on the bill of lading were simply identification marks. I was also agent for the Texas Pacific road, and they required from me the same duties as the Iron Mountain. It facilitated business to have me represent both roads, because it was a transfer point. I generally took up the local bills of lading when the through bills of lading were issued. When a lot of cotton came in over the Texas Pacific road for Potter I first referred to my records and saw how much cotton was in the compress, then got the bills of lading certified to see whether the marks were correct, and checked the bills of lading or dray tickets which represented the number of bales of cotton. Very nearly all the cotton came consigned directly to G. T. Potter and not to the shipper's order, and was delivered to him at the compress. My records show
that the cotton was in the compress during the month
87 of December, when these bills of lading were signed. My records showed that there were so many bales of cotton unloaded for Potter and delivered to him there at the compress. My records show how many bales of cotton went in and how many came out. In order to check the marks we had to get and O K from the compress company.

Cross-examination:

I am now freight agent at St. Louis for the Missouri Pacific railway, which operates the Iron Mountain road, although it is a separate corporation. I have been local freight agent for the Iron Mountain road for four years. I went to Texarkana the first of April, 1877. It was no part of my business to make rates or to solicit freight; the general agent does all that. Mr. Potter

was the first Eastern buyer of cotton that was at Texarkana. The railroad company paid for compressing the cotton. The compress company owned about ten acres. It was a separate and distinct organization. Both the Texas Pacific and the Iron Mountain had tracks running to the compress. When
88 the cotton was compressed it was put on our loading platform. Mr. Potter got the local bills of lading, I heard, out of the bank when I issued the general bills of lading. I had nothing to do with the bank. I was not an officer of the Taxarkana bank. I was only a stockholder. I didn't know that Potter paid for the cotton by negotiating the drafts. The cotton was in my possession or control when I issued these bills of lading. From my best information the cotton was there when I gave these bills of lading. My record shows this, or I wouldn't have had the means of knowing. I did not intend to defraud any one, and would not knowingly issue any bills of lading for cotton that was not in my possession. I did not see the marks. The evidence I had showed it was marked. The O K that I required on these bills of lading was proof to me that it was marked. I acted on that belief. I knew the marks on the cotton were simply for identification. We shipped the cotton to the destination called for by the bills of lading when the marks corresponded. I remember that our shipping platform broke
89 down because of the great weight of cotton on it. I had nothing to do with the marking of the cotton. It was done by Potter and his men. I gave notice several times to Mr. Martin to have cotton marked up for shipment for which I had signed bills of lading. All of the bills of lading except the one dated December 5th have got Mr. Martin's O K on them, which were put on before the bills were signed. The O K was put on before I signed the bills of lading. I was obliged to have confidence in Mr. Martin. I knew nothing at all about the grades of cotton. I had heard in a general way that there were different grades. Mr. Potter did a very large business with the bank, and, as the investigation showed, used all of the bank's money. In December, when they dishonored his paper, I had my doubts, and I kept my eye on Potter. I would not certify to the statements made by the tracer without my memorandum on it. Part of the sheets of the tracer are in Mr. Frink's handwriting. The fifth sheet is in mine—the others I don't know about.

(The witness here identifies two letters of Mr. Frink, dated June 15th and June 29th, 1880.)

90 T. L. MARTIN testifies as follows:

I live at Texarkana. In the years 1879 and '80 I was superintendent for the cotton compress at Texarkana, where we were pressing cotton under contract with the Iron Mountain railroad. We had a warehouse with a track on both sides and a Taylor press for doing the work. We figured on pressing 500 or 600 bales a day. During the season of 1879–'80 we were troubled a great deal with the press; it broke down two or three times, I think. At one time during the season we were broken down about two weeks and un-

able to do any work. During that season, commencing in December, we received so much cotton that we were unable to take care of it and had to store *it* a great deal of it in the warehouse. In the month of December, I think, we had from 5,000 to 7,000 bales stored in the warehouse; some of it was five tiers deep. During December and January we received from 500 to 1,500 bales of cotton a day; 1,500 bales is the highest day's receipts we had at Texarkana. G. T. Potter had his headquarters in our ware-
91 house during the year 1879 and '80. Our receipts during that year were something over 45,000 bales; I think 15,000 bales of that came in to Potter—I mean from September, 1879, to to September, 1880. The bulk of the cotton comes in from October to the last of February. I think we closed our compress for the season in May, 1880. Nearly all of Potter's cotton came in over the Texas Pacific and was delivered at our warehouse. The cotton had shipping marks on it to identify it; put on by the planters who shipped it to Mr. Potter. When the cotton was delivered at the compress it was turned right over to Potter and his men. Potter had three clerks and two negro hands who did the marking before it was compressed. I know nothing about the grading; I know only about the shipping marks. He did not consult me at all as to the marks that were to be put on, and I knew nothing about what the marks meant; the marks were simply meant for identification to designate the lots. We took an account of the marks generally by an entry in our receiving book, which was burned in March last when our warehouse was de-
92 stroyed by fire. We were entirely independent of the railroad company, and I received my instructions and authority from J. W. Paramore, who was at that time president of the compress company. I suppose some of the cotton remained in the warehouse thirty or sixty days, possibly longer; all through cotton was pressed in the order that we received it.

We gave the through cotton a preference. I O K'd the bills of lading for Potter and he presented them to the agent and got them signed. Potter, or some of his men, drew the bills of lading. The O K on the bill of lading dated December 17th is in my handwriting, and was put on before O'Connor signed the bill of lading. I O K'd all the bills of lading before O'Connor signed them, except the one dated December 23rd, which was O K'd by my authority by a young man I had there. Potter presented the bills of lading to be O K'd; sometime some of his men did it for him. The letters O K certify to the fact of the cotton being marked; that the bills of lading were correct. The press company took charge of the cotton after receiving it from the railroad company. Most of Potter's cot-
ton came over the Texas Pacific road. The cotton was in the
93 warehouse when the bills of lading were given. Some one that was connected with the compress company examined the cotton to see whether the bills of lading corresponded. It was my business to know before I O K'd the cotton that it was correctly represented. I had two men there that looked after it more than I did, though. We made it a rule never to O K bills of lading unless

the cotton was marked. I usually let some of my assistants see about the correctness of the mark. I believe I have seen Potter or his employees scratch out some of the marks, but I never permitted any changes in the marks after the bills of lading were issued or after I had O K'd them. I did not know that this was done on cotton covered by bills of lading. I do not know how much cotton was in the compress belonging to Potter at the time he failed. Potter had been shipping cotton there right along through the winter, and he directed what cotton was to be shipped East after it was pressed. The only way we identified cotton in the compress was by attaching a tag having a number on it representing the bale of cotton; we were guided by both the marks and the tags. I believe Taylor attached
94 some of Potter's cotton—about 30 odd bales. This cotton had been compressed and marked and was in the warehouse at the time. Henderson's memorandum containing the marks upon the cotton was given to me by O'Connor, and I handed it over to Henderson and told him that the railroad company wanted that cotton; this was after Potter had left town. I cannot remember whether all of this cotton was compressed or not. I know nothing about their changing the marks to indicate a grade different from what it in fact was. They may have done so. We didn't pay any attention as to what the marks indicated; we only used them to identify the cotton. The reason that the cotton was marked up so quickly was because Potter was in a shaky condition and I wanted to see that the railroad company got the cotton. I think it was marked up quickly because Potter was in trouble. It didn't matter to us what the grade of the cotton was; every bale went through the same press without reference to grade. We made it a rule never to O K bills of lading unless the cotton was absolutely on hand and marked. We only used the marks to identify the cotton.

95 Cross-examination:

I am not in the empl-y of the railroad company. The cotton compress company got its pay from the railroad. We had the cotton in our warehouse for the railroad and held it for them after it was marked. Whenever the cotton was pressed and the bills of lading were O K'd by me we turned the cotton over to O'Connor. The cotton when it was marked by Henderson was for the most part in the warehouse. I believe I had two or three notices from O'Connor about the cotton being short and that he wanted it. I don't know whether O'Connor knew that there was no cotton there of the proper mark. I had nothing to do with the marking of the cotton. I cannot say whether we had any cotton at that time in the warehouse which corresponded to the mark. I only know that we had a rule not to sign unless we did. I told Henderson to mark up the cotton, but I did not help him to do it; all the cotton was then marked up which remained there.

E. A. BERRY testified as follows:

I live in Savannah, Indian Territory. In the winter of 1879 and '80 I was at Texarkana, connected with the freight handling
96 of the Iron Mountain and Texas Pacific railway. I handled all the cotton for both roads. I suppose each road bore their share of the expenses. The accounts of the two roads were kept separately. I was at the compress probably a dozen times a day. Some cotton would be ready for shipment in four days after it was put into the compress. Some wouldn't be ready for sixty days. There was a very large amount of cotton there—the receipts were very heavy that winter. When the cotton had been compressed and was ready for shipment, dray tickets were given for the purpose of identification. When I received them I would simply load the cotton called for by the dray tickets—so many bales, such and such a mark, and endorse on the dray ticket the number of the car in which it was loaded, and passed it into the bill clerk for a way-bill. Most of the cotton was placed on what we called the loading platform. After the cotton was received it passed through the warehouse and came out, after being compressed, on the loading platform on the west side of the warehouse. I had the entire supervision of the loading of the cars. I knew there were no cars loaded where the marks on the cotton did not correspond with the bill of landing.

97 Cross-examination:

I don't remember seeing the statement prepared by Mr. O'Connor. I don't remember about changing the marks on the cotton about the 10th of April. It was quite an ordinary occurrence, when the lots of cotton called for by the bills of landing were not all compressed, to call on Mr. Martin, the superintendent of the compress, for the lots called for, so that they could be shipped. I know it is a common occurrence for cotton to be short in this way. I know nothing about the changing of the marks. I do not know that the marks on the bills of landing were the marks on the cotton Potter shipped to other parties. I do not know what the marks designated.

JOHN J. O'CONNOR, recalled, testified as follows:

I know of my own knowledge of cotton being shipped to plaintiff, Mr. Potter, and other parties having block [G. M.], and I think S. M., but the counter-mark would be different. The block mark was the same to other parties, but a different counter-mark.

Rebutting Testimony.

98 J. M. HENDERSON, recalled by plaintiffs, testified as follows:

The invoice, dated January 2nd, 1880, for 22 bales, were classed, marked, and weighed by me, and I made out the invoice and attached the detailed weights to it. On the invoice dated December 22nd, 1879, the detailed weights are in my brother's handwriting.

Both of the invoices were made out in the office of Mr. Potter. The cotton was of the grade indicated by the mark. I do not think they were shipped; I think they were afterwards altered to something else; I think they were altered by Potter's direction to fill up some cars of the same grade for other people, and shipped to them. The invoices were given before the cotton was altered. I suppose the cotton was shipped over the Iron Mountain road. There was a great deal of cotton of the same grade sold to other parties. The memorandum I have shows the cotton that was shipped by Potter, when it was shipped, and what its grade was. I do not know how much cotton of the same grade was shipped to other people.

Cross-examination:

99 I had nothing to do with the shipment; Potter and his foreman, Mr. Stewart, managed that. I knew the marks had been changed at times. There was a few instances where the marks on the cotton were changed, to change the destination after the invoices had been signed. The marks were changed between the time they were signed and the time the cotton was shipped. I was a tool of Mr. Potter's, to be driven round to suit him.

100 E. F. HENDERSON, recalled, testified as follows:

I marked the cotton and made out the detailed weight on the invoice dated December 22nd, 1879. We classed, marked, and weighed all of them before the cotton was compressed. From October 25th to January 13th I think we sent 4,264 bales of cotton of grades corresponding to those handled by the Knights to other parties than the Knights. Between December 17 and January 4 there were 1,156 bales corresponding to the grades handled by the Knights billed to other people.

Cross-examination:

There were no marks changed, except at the time of these few bales—50 or 100 altogether—during the season. The shipping mark is put on the cotton before it goes into the compress. Two or three times during the season there was cotton there with the same marks that Potter had bought to go to one shipper which had to go to another. No cotton was particularly bought for any one person. He bought it, marked it, and sold it afterwards. He marked it according to its grade, and designated the particular person to whom it was to go by the shipping mark. There was nothing on the cotton to show where it was to go until the bills of lading were made out. There were never any marks put on the bales of cotton to designate the destination. The mark in the block desig-
101 nated the grade and the mark on the outside the lot. The outside marks indicated to whom the cotton was to go; I think they issued bill of lading before there was a bale of cotton in the compress or in the warehouse. There was a large amount of cotton corresponding with this grade at the time these bills of lading

were given; a large quantity of it was marked. In the latter part of December there were 5,000 bales of Potter's cotton in the possession of the railroad.

It is admitted that all the cotton in question was shipped after April 12, 1880. The testimony of the witness Fifield also showed that the loss to plaintiffs on account of the inferiority of the cotton delivered, which had been shipped after April 12, 1880, and which did not correspond with the grade indicated in the bills of lading, was the sum of $11,808.51, as per Exhibit I, hereto attached.

Exhibits hereto attached were offered in evidence, which was all the testimony offered by either party in the case.

And thereupon the court charged the jury as follows:

(Here insert charge.)

102 The following is the full charge to the jury by Judge Blodgett:

FEBRUARY 9, 1884.

GENTLEMEN OF THE JURY: The claim of the plaintiffs in these cases is that the defendant, in December, 1879, and in January, 1880, issued to one Potter bills of lading for cotton consigned to the order of Potter, designated by certain marks indicating the grade or quality of the cotton; that Potter drew drafts on the plaintiffs for certain sums of money, usually, as I understand the testimony, representing the purchase price of the cotton, less the cost of transportation, which drafts were duly paid by the plaintiffs, and that the defendant, instead of shipping to the plaintiffs cotton of the quality called for by these bills of lading, shipped and sent forward to the plaintiffs cotton of an inferior quality, and this suit is brought to recover the difference between the value of cotton of the quality called for by these bills of lading and the value of the cotton actually received by the plaintiffs.

103 The proof tends to show that Potter was a cotton broker at Texarkana, Arkansas, in the fall of 1879 and winter following; that he bought most of his cotton at points in Texas on the lines of railroads running south and southwest and west from Texarkana, and that it was brought to Texarkana by these railroads and there delivered upon the platform of what is know- in the testimony as the cotton compress company; that this compress company was a corporation whose business it was to compress cotton, and that all the cotton bought by Potter and delivered at Texarkana was to be there compressed before it was shipped East and North by the defendant. This compress company had a large warehouse, where cotton was stored until it could be compressed and made ready for shipment.

The testimony tends to show the course of business to have been this: Cotton was bought by Potter and delivered into the compress house. It was there weighed, classed, or graded by Potter and marks put upon each bale indicating the grade or quality of the cotton and the lot to which it belonged. When Potter had so

weighed, graded, and marked a number of bales he made out a bill of lading, describing certain bales of cotton by the marks on the bales; had the superintendent of the compress company warehouse certify to the fact that the cotton called for by
104 these bills of lading was in the warehouse, and the bills of lading thus certified to by the letters "O K" and the signature of Martin, the superintendent of the compress warehouse, were signed by O'Conner, the freight agent of the defendant at Texarkana. Potter then drew drafts on the persons to whom he had sold cotton of the grade called for by these bills of lading, attached these bills of lading to the drafts, and some local bank at Texarkana or some of the adjacent towns or cities cashed these drafts, and they went forward to some correspondent of such bank for collection, and in due course of mail and long before the actual arrival of the cotton the drafts were paid; and this seems, from the proof, to have been the course of business between the plaintiffs and Potter.

There is also testimony in the case, given by Potter himself, which tends to show that the bills of lading were issued upon cotton before it had been received into the warehouse upon some understanding or agreement between Potter and O'Connor that they should be so issued, and that Potter would afterwards put the cotton to respond to those bills of lading into the warehouse.

It is conceded that the defendant, and it is in fact provided
105 in the bills of lading, that the defendant, the railroad company, should compress this cotton before shipping to the North or East, and that the expense of compressing was paid by the defendant out of its charges for transportation; that some time necessarily elapsed between the arrival of the cotton in the compress warehouse and the time when it was compressed and made ready for shipment. Especially was this so in the fall and early part of the winter, when there was a large rush on cotton and it was impossible to compress and handle the cotton as fast as it came in. The cotton therefore accumulated in large quantities in the compress house, awaiting compression and getting ready for shipment.

And there is also proof in the case tending to show that when it was ready for shipment it was turned out onto what was known as the loading platform, and was there shipped to such consignees as Potter directed—that is, bills of lading having been given to various persons, Potter directed to whom he would have each lot, as it was turned out ready for shipment, sent or forwarded.

The controversy in this case is wholly in regard to 525 bales of cotton covered by the eight bills of lading offered in evidence in this case. These bills of lading, as you will remember, covered a large amount of other cotton which it is conceded was re-
106 ceived in due course of business, and answered to the marks of quality which were upon the bales; but it is claimed on [the] part of the plaintiffs that 525 bales of the whole number of bales covered by the bills of lading were not of the quality called for by these bills of lading, and this suit is wholly in regard to those.

The plaintiffs claim that on or about the 9th of April, 1880, there still remained unshipped from Texarkana and in the compress warehouse 525 bales of this cotton, for which they held bills of lading; that on or about the 9th of April there remained in the compress house about 800 bales of cotton of an inferior grade to that indicated by the marks on the cotton called for by these bills of lading; and that certain employees of Potter, as plaintiffs insist, with the knowledge of O'Connor, the defendant's freight agent, remarked this cotton with marks indicating the grade or quality called for by the bills of lading; and the defendant forwarded this inferior cotton to the plaintiffs instead of the actual quality called for by these bills of lading.

The plaintiffs' proof also tends to show that when this inferior cotton arrived at its destination, Providence, Rhode Island, plaintiffs declined to accept it, caused it to be put into an auction house, and sold for the benefit of whom it might concern, notified the
107 defendant of what they had done before this sale took place, giving the defendant opportunity to reclaim and take the cotton if it saw fit, and dispose of it itself; and this suit is now brought to recover the difference between the proceeds of this inferior cotton, as the plaintiffs claim, and the drafts and freight they have paid.

Upon the facts in this case as disclosed by the proof several important questions of law arise.

1st. This compress warehouse must be deemed the warehouse of the defendant. If you find from the proof that it was used by the defendant as the place for storing the cotton while the defendant was compressing the same—that is, if while the defendant was getting the cotton ready for shipment north it used the compress warehouse for the purpose of storage—then the compress warehouse must be deemed the defendant's warehouse for that purpose.

2nd. The proof without controversy seems to be that it was understood between Potter and the defendant that all the cotton covered by these bills of lading was to be compressed before it was to be put on the defendant's cars for actual transportation. While it remained in the compress house for compression, awaiting further shipment, the defendant's liability was that of a warehouseman only, and
108 not that of a carrier: that is, the defendant was liable for due and ordinary care, such care as warehousemen are expected to take of property placed in a warehouse for keeping. A common carrier's liability is of an extraordinary character, and covers every risk that the property can be subject to, except a loss by the act of God or by an unavoidable accident, and by the public enemy, unless this extraordinary liability which the law imposes is limited or restricted by the contract between the parties, so that this extraordinary liability, as a common carrier, did not commence until the property was actually loaded or taken for transportation; but the liability was that of a warehouseman until the transportation was actually commenced.

3rd. These bills of lading are not negotiable in the sense that promissory notes or bills of exchange are negotiable; that is to say,

a promissory note or bill of exchange which has passed into the hands of a third person before maturity for value and without notice of equities against it is held by the person thus taking it free of all equities between the original parties; he takes it free of all defenses which might be set up between the original parties to the transaction. But these bills of lading are a mere contract for trans-
109 portation, and are not negotiable in the same sense that a promissory note is negotiable; and, therefore, all the equities between the original parties to the transaction are open for consideration by the court; and one question is whether any defense which has been suggested here, as between Potter and the railroad company, can be set up as against the plaintiffs. The plaintiffs, for most purposes, stand in Potter's shoes, and any defense which the defendant could have made against Potter can be heard and considered in this case against the plaintiffs.

But this rule must be taken with this qualification, that after the issuing of a bill of lading by the defendant as a warehouseman or common carrier no collusive agreement or conduct between the defendant and Potter can be allowed to prejudice the plaintiffs' rights as holders of these bills of lading. The plaintiff have the right to have the contract performed substantially as it was made between Potter and the defendant. There can be no substantial change in the terms of the contract to the prejudice of the plaintiffs or any person to whom the contract or bill of lading may be assigned.

The defendant is not as a common carrier a guarantor of the quality of the commodity it assumes to transport; but it [is] liable, as a rule, to transport the identical article or goods described in
110 its contract. If it receives goods designated by certain marks it is bound to transport and deliver the identical goods delivered to it under those marks and which it was intended should be transported under the contract.

This rule may, however, be subjected to a qualification or limitation under the facts in this case as you may find them to be. The proof tends to show that Potter marked quite a large number of bales with the same grade and lot marks as those described in these bills of lading, and there is proof tending to show that no specific bales of cotton were set apart or considered as forming the particular bales to be shipped on these bills of lading, but it was understood between Potter and the defendant that out of the lot or quantity of bales marked in the manner designated in these bills of lading a sufficient number to make up what are called for by those bills of lading should be shipped. If you so find, then the defendant was bound to ship the number of bales called for by these bills of lading out of the larger quantity bearing the same common marks, and this would be the contract, if you find from the proof that the cotton in question was to be drawn from a larger lot bearing the same common marks.

111 The testimony on the part of the defendant tends to show that the defendant's agents did not know at the time of the issuing of these bills of lading that the marks on these bales indi-

cated the quality or grade of the cotton; that, so far as Mr. O'Conner and the other agents of the defendant who had the responsible charge of the defendant's business at Texarkana were concerned, the marks only indicated a means of identification, and the quality of the cotton was not considered by them; that a bale of cotton to them was only a bale of cotton, without regard to quality; that in shipping the cotton in fulfillment of these bills of lading they only refer-ed to the marks as a means of identifying or determining what cotton they were to ship under each bill of lading.

As has been stated, the plaintiffs' proof tends to show that on or about the 9th of April the employees of Potter, with the knowledge of the defendant's agent, marked a lot of about 800 bales of inferior cotton, then in the compress warehouse, with grade-marks corresponding to those called for by these bills of lading, and that the defendant shipped this inferior cotton to the plaintiffs in fulfillment of its contracts under these bills of lading—

While the defendant's proof tends to show that the defendant's agents had no knowledge of the fact that this cotton was of a
112 quality inferior to that called for by these bills of lading, and had no knowledge of the fact that the grade-marks on the bales so shipped had been changed from marks indicating a lower grade to those indicating the grade called for by the bills of lading, but that, on the contrary, they accepted the cotton with the belief that it was the cot[ton] called for by the bills of lading, and which had been delayed in the warehouse up to that time for the purpose of compressing and getting it ready for shipment.

4th. If the proof in the case satisfies you that the defendant's agents knew or were informed at the time they shipped this cotton to the plaintiffs or accepted it for shipment that it was of a quality inferior to that called for by the bills of lading which the defendant had issued for it, and knew that the marks on those bales or packages had been changed from marks indicating a lower grade or quality of cotton to marks indicating the grade called for by the bills of lading, then the defendant is liable in this action for the difference in value between the cotton of the quality called for by the bills of lading and the value of the cotton actually shipped—that is to say, if the proof satisfies you that the agent of the defendant connived at the substitution of a lower and inferior quality of
113 cotton in place of that called for by the bills of lading, although the marks may have been such as called for by the bills of lading, then the defendant is liable—

While, if from the proof you are satisfied that when the agents of the defendant actually shipped the cotton they had no knowledge of the difference in quality between the cotton so shipped and that called for by the bills of lading, and had no knowledge that the cotton was, in fact, inferior to that called for by the bills of lading, and that the grade-marks on the bales had been changed from marks indicating a lower grade to marks called for by the bills of lading, then the defendant is not liable.

You are to determine then, as a question of fact, from the testimony—

First. Whether it was in the course of business in the handling of this cotton in the warehouse to set apart and keep separate the cotton covered by each bill of lading from the time such bill of lading was issued, or whether the defendant's agent, O'Connor, only satisfied himself, through the agency of Martin or his employees, that there was enough cotton, as stated in the bills of lading, to fill such bill as part of a common lot answering to the same description. As, for illustration, there might be in a railroad warehouse in this city 10,000 barrels of flour of one brand, and ten bills of lading
114 might be issued, each to a different person, calling each for 1,000 barrels of this lot of flour. No one barrel would be specifically set apart as belonging to any one of these bills of lading; but any one of the 10,000 barrels would be liable to be shipped on any of these bills of lading—that is, it would be assumed that the entire lot was uniform and alike in quality, and it would, therefore, make no difference to the persons to whom it was shipped which particular barrel of flour he got. If such was the mode of doing business in this compress warehouse, and Potter understood it, then the defendant was not obliged to keep separate cotton called for by each bill of lading, but could fill the bill of lading out of the common lot bearing the same marks.

Second. Did the agents of the defendant in charge of the issue of these bills of lading and the shipment of this cotton know the grade-marks of this cotton called for by the bills of lading; and did they know that this 525 bales in question was of an inferior grade to that called for by the bills of lading; and did they knowingly accept this inferior quality of cotton in place of that called for by the bills of lading, and ship the same to plaintiffs?

As I have stated, a common carrier is not, as a rule, a guar-
115 antor of the quality of the goods transported, but it is bound to transport and deliver the identical goods covered by its contract, where such identity can be established, and, therefore, if at the time these bills of lading were issued it was not intended that they should cover any specific bales, but only a given number of bales, bearing certain common marks, without regard to quality, as understood by the defendant's agents, and that the defendant did ship the number of bales called for by the bills of lading, and marked as required by the bill- of lading, with no knowledge or information that the cotton contained in those bales was inferior to that called for by the bills of lading, then the defendant is not liable.

But if you are satisfied, from the proof, that the agents of the defendant knew at the time they received and shipped the 525 bales in question that it was inferior in quality to that called for by the bills of lading, and that fraudulent or false grade-marks had been put upon these bales corresponding to the marks called for by the bills of lading, then the defendant is liable.

The defendant, having, as I have already stated to you, assumed the responsibility of a warehouseman in regard to this cotton while

it was being compressed and prepared for shipment, was
116 obliged to see to it that the cotton it had receipted for was kept on hand for shipment, and had no right, knowingly, to allow a lower grade of cotton to be substituted for that called for by the bills of lading.

If, then, gentlemen, upon the instructions which I have given you, you come to the conclusion the defendant is liable, you will then have to consider the question of damages. The plaintiffs' witness has made up a computation upon the basis of what the cotton cost them at Texarkana, they having paid the drafts, and the cotton going forward to them subject to freight. Mr. Fifield has testified to you that that this was the course of business so far as payment was concerned; that the drafts represented the cost of the cotton to them at Texarkana, and the cotton cost them the freight in addition. The bill of lading in this case provides that in case of loss the measure of damages shall be the value of property at the place of shipment. "In the event of the loss of property under the provisions of this agreement the value or cost of the same at the point of shipment shall cover the settlement." So that I think that under this contract the value must be ascertained at Texarkana, and Mr. Fifield is the only witness who testified to that,
117 and he says the value was represented by the drafts which the plaintiffs paid. He has therefore made the computation of the money paid for this cotton at the time the bills of lading went forward. He has computed the interest up to the time this inferior cotton was sold and the proceeds realized. He has then given credit for the amount of the proceeds and computed interest up to the present time, as I understand, upon the balance left unpaid. This would be the proper measure of damages if you are satisfied with the computation which he has made.

There is a clause which has been referred to by counsel engaged in the trial upon the argument in reference to the duty of the consignee under claims for damages. "Claims for damages must be reported by the consignee to the delivering line within thirty-six hours after the arrival of the freight at the place of the delivery indicated above." As I construe this contract, this clause does not govern this case, and it cuts no figure in regard to the rights of the plaintiffs in this case. This is not a claim for damage within the meaning of that clause, but it is a suit against the defendant for not having forwarded the cotton which was covered by its bills of lading. When the cotton arrived the plaintiffs were not bound to accept it at all, because it was as they claim; and if
118 you find the testimony sustains their view of the case it was not the cotton which the defendant had agreed to send them; if their theory of the case is sustained by the proof they had no claim for damage—they simply refused to receive this cotton as that called for by the contract.

They said: "This is not our cotton; this is not the cotton we bought and paid for and you agreed to ship to us. We therefore put it in a warehouse and notify you that it is your cotton. If you

don't take charge of it we shall direct it to be sold for account of whom it may concern."

But, having directed it to be sold for account of whom it may concern, they received the money which was the proceeds of that cotton. But it is not a case where it is a claim for damages where goods come forward injured or in any bad condition such as may make a claim for reclamation upon some one of the carriers in the line over which it has been transportated.

If, in conclusion, then, you are to say from the proof whether the plaintiffs' position that the agents of the defendant knowingly consented to receiving and shipping on these bills of lading cotton of an inferior or lower grade than that called for by the bills of lading, or whether from the course of business the defendant's agents,
119 at the time they received and shipped this cotton, acted in good faith toward the holder of the bills of lading, whatever they might and did not intentionally or knowingly assent to the shipment of inferior cotton in the place of that called for by the bills of lading—

You will take with you to the jury-room the statement made up by Mr. Fifield and examine it, and, if you see fit, you can verify his computations, because you are not bound by his computations, but may make a computation for yourselves.

120 O'CONNOR' STATEMENT. EXHIBIT A.

St. Louis, Iron Mountain & Southern Railway.

Abstract of way-bills received at —— station during the quarter month ending ——, 188–.

Date.	B. L.	Marks.	No. bales.	Marked up.
1880.				
April 7	243	R / A c^{32} < R > B c 8	40	40
1879.				
Dec'r 23	221	[G O] B	2	2
1880.				
March 13	220	X C X	3	
"	219	C V C	4	
"	"	F C C	7	
"	"	O C O	8	
11	217	J. M. S.	20	
"	"	O J O	20	
"	"	J X J	20	
"	"	J J J	1	
"	216	J G M	17	17
"	214	G < H I > J	11	1
"	"	S < M > J	9	
"	"	J A J	6	
5	211	V L P	10	
"	"	F L P	9	
"	"	O L P	9	
4	210	T O M	1	
		< J E >	7	
1	209	E S F	4	
1	"	E S X	6	
Febr'y 25	204	S G O \ D	1	
"	203	H [H] < H >	31	
"	202	E X X	08	
"	201	B X B	2	
"	"	E X E	3	
"	198	V. E. S.	1	
"	"	X E S	1	
Jan. 17	195	X X P	50	X X E 26
26	158	[Mc] G	1	
24	152	< F > S	2	
22	148	[S H I] G	1	
14	133	X X D	13	
13	129	D E C	1	1
"	"	[G M] S	5	
2	124	[S M] K	22	
"	119½	"	23	
Dec. 31	118	[G M] H	7	
"	117	[S M] I	05	
23	116 & 109	E D R	80	9
22	105	[G M] S S	7	
"	" & 83	[S M] S S	58	
"	"	X X E	38	
20	102	[Mc A] 22 [D M] 25	47	
"	99 & 96	[P P] &c	41	
15	84 & 86	R O V	150	2
5	62	[S M] F S	3	3
			810	102

121 EXHIBIT B.

Geo. Olds, gen'l freight agent, St. Louis, Mo.; J. J. Rogers, ass't G. F ag't, St. Louis, Mo.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO.,
X M., *Dec'r* 5, 1879.

Rates guaranteed to St. Louis, Mo., at proportionate — thro' Boston.
Val. ——.
Charges advanced $—.

1st class, —— cts. per 100 lbs.

2d class, —— cts. per 100 lbs.

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3rd class, —— cts. per 100 lbs.

4th class, —— cts. per 100 lbs.

Received from G. T. Potter the following packages, contents unknown, in apparent good order, marked and numbered as per margin, to be transported from Texarkana, Ark., to St. Louis, and delivered to the consignee or a connecting common carrier. The packages aforesaid may pass through the custody of several carriers before reaching their destination; and it is understood as a part of the consideration or which the said packages are received that the exceptions from liability made by such carriers, respectively, shall operate in the carriage by them, respectively, of said packages, as though herein inserted at length; and especially that neither of said carriers, or either or any of them or this company, shall be liable for leakage of any kinds of liquids nor for losses by the bursting of casks or barrels of liquids arising from expansion or other unavoidable causes, breakage of any kind of glass, carboys of acid or articles packed in glass, stoves and stove furniture, castings, machinery, carriages, furniture, musical instruments of any kind, packages of eggs, or for loss or damage of hay, hemp, cotton, or for rust of iron or iron articles, or for loss or damage of any kind on any article whose bulk requires to be carried on open cars, or for leakage of grain in bulk, or for damages to personal property of any kind occasioned by delays from any cause or change of weather, or for loss or damages by fire or for loss or damage on seas, lakes, canals, or rivers.

And it is further specially understood that for all loss or damage occurring in the transit of said packages the legal remedy shall be against the particular carrier only in whose custody the said packages may actually be at the time of the happening thereof, it being understood that the St. Louis, Iron Mountain & Southern Railway Company, in receiving the said packages to be forwarded as aforesaid, assum-s no other responsibility

for their saf-ty or safe carriage than may be incurred on its own road. All goods carried by this company are charged at actual gross weight, excepting such articles as are provided for in our general tariff.

5th class, —— cts. per 100 lbs.

All property will be subject to necessary cooperage, and freight is to be paid on the actual gross weight as ascertained by the company's scales. Carriers will not be accountable for loss in weight of flour, grain, seeds, feathers, or other goods arising from unavoidable causes. Cotton in bales is at owner's risk of wet or dirt. Claims for damages must be reported by consignee in writing to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery.

Cotton, —— cts. per ——.

123

If such notice is not there given neither this company nor any of the connecting or intermediate carriers shall be liable. In the event of the loss of property, under the provisions of this agreement, the value or cost of the same at the point of shipment shall govern the settlement.

The carriers reserve the privilege of compressing all cotton signed for on this bill of lading.

—— cts. per 100 lbs.

☞No liability will be assumed for wrong carriage or wrong delivery of goods that are marked with initials, numbered, or imperfectly marked.

—— cts. per 100 lbs.

NOTICE.—This contract is accomplished, and the liability of the companies as common carriers thereunder terminates on the arrival of the goods or property at the station or depot of delivery, and the companies will be liable as warehousemen only thereafter, and, unless removed by the consignee from the station or depot of delivery within twenty-four hours of their said arrival, they may be removed and stored by the companies at owner's expense and risk.

Flour and meal — per bbl.

NOTICE.—In accepting this contract the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations and conditions.

Beef, pork, and fish — per bbl.

Consigned to ac. ag't Wabash & N. A. F. F. line at ——.

Special — per —.

☞Weight and classification subject to correction.

124

Marked.	List of articles.	Weight.
[P P] ----	Seventy-four bales cotton, adv. ch'g's $111.00 ----------	35,964

Order shipper notify—

B. B. & R. KNIGHT,
Providence, R. I.

Deliver cotton Woonsocket, R. I.

Copy.

125

EXHIBIT C.

Bill of lading, dated Dec. 5, 1879, like foregoing, except the goods are to be transported from Texarkana to Providence, to be forwarded from St. Louis to destination.

Marked.	List of articles.	Weight.
R O V $\frac{27}{200}$ ----------	One hundred and seventy-four bales, adv. ch'g's, $391.50 ----------	85,434

O K.

F. L. MARTIN, *Sup't.*

DEC. 20, 1879.

Marked.	List of articles.	Weight.
[G. M.] S S 20----	One hundred bales cotton ----------	49,100
[S M] S S 40----		
[P. P.] 40----		
[P P] 15------	Fifteen bales cotton----------	7,365
		56,465

O K.

F. L. MARTIN.

126

EXHIBIT D.

DEC. 22, 1879.

Marked.	List of articles.	Weights.
[G. M.] S S 40----	Two hundred bales cotton; ch'g's, $450.00 ----------	97.200 lbs.
[S. M.] S S 60----		
X X D 100----		

O K.

F. L. MARTIN.

JULY 2*nd*, 1880.

Marked.	List of articles.	Weight.
[S M] K 22 5 c--	Twenty-eight bales cotton ----------	13,979
G K M $\frac{6}{28}$ ------		

F. L. MARTIN, *Supt.*

127 EXHIBIT E.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY,
OFFICE FREIGHT AGENT,
TEXARKANA, *M'ch* 20, 1880.

F. L. Martin, supt. Texarkana cotton compress.

DEAR SIR: At various times since beginning of last Dec. we have delivered you sundry lots of cotton, for account of G. T. Potter, to be compressed and shipped East, and in order that the lots and marks be returned us intact we require your endorsement on face of copy of b. of lading (for each shipment) kept by us before we signed same.

We find several shipments that we issued b. of ladings for several months ago still incomplete.

The required number of bales are on your platform, but the marks do not agree with our b. of ladings (endorsed by you). We are, therefore, compelled to demand that the discrepancy in marks be at once straightened, and shall hold your company accountable for any claim that may result from detention.

Resp., J. J. O'CONNOR, *Ag't.*

128 EXHIBIT F.

TEXARKANA, *April 27th*, 1880.

S. Frink, Esq., gen'r'l fr't ag't.

DEAR SIR: Your attention is invited to copy of letter attached, dated March 20th, '80, original of which I served (in person) upon F. L. Martin, supt. of cotton compress Co. On one or two subsequent occasions Mr. Martin asked me for a statement of marks, &c., of cotton required to complete b. l.; they were promptly furnished, the last one given him April 9th. On April 12th he wrote as follows:

"COMPRESS, TEXARKANA, ARK., *April* 12, 1880.

"J. J. O'Connor, ag't, Texarkana, Ark.

"DEAR SIR: All back marks guaranteed by me are now marked up in accordance with list furnished us on April 9th. Please acknowledge same and oblige

"F. L. MARTIN,
"*Sup't Compress.*"

I have not yet acknowledged receipt of above letter for the reason that the 33 bales required to make above letter (dated April 12th) an accomplished fact were attached on April 10th.

Resp., JNO. J. O'CONNOR, *Ag't.*

129 EXHIBIT G.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO.,
GENERAL FREIGHT OFFICE,
ST. LOUIS, *June* 29, 1880.

B. B. & R. Knight, Providence, R. I.

GENTS: I enclose herewith an affidavit of J. J. O'Connor, ag't, upon the subject of your letter of June 11th, in which he answers the charges made by you, and, as I look upon it, exonerates this Co. fully in respect to the quality of cotton sent you by Mr. Potter. I have seen the triplicate bills of laden held by Mr. O'Conner, upon which he took the guaranty of the compress Co. sup't for number of bales and marks, and also a letter from sup't comp. Co., in which he states that all lots guaranteed by him are filled. If there was any collusion with any one, I feel sure it was not with any employé of this Co.

As I now see it, all questions as to grade of cotton is between you and Mr. Potter, and this Co. is in nowise responsible therefor.

I feel that I may safely assure you that we are as ready to assume any proper responsibility as to decline any which does not properly attach to us.

Resp'y, S. FRINK, *G. F. A.*

130 Copy.

STATE OF ARKANSAS, *County of Miller:*

Personally appeared before me this day Jno. J. O'Connor, who, being duly sworn, deposes and says that he is now and has been for more than three years past the freight agent of the St. Louis, Iron Mountain and Southern Railway Company at Texarkana, Ark., and as such agent he denies certain allegations contained in letter (hereto attached) marked "Exhibit A" and "Exhibit B." He never authorized or caused to be marked at any time the cotton shipped by G. T. Potter to Messrs. B. B. & R. Knight, as mentioned in said letter, neither did he sign bills [of] lading for any of the cotton mentioned until after it was actually in possession of the Co., and the marks certified to by the sup't of compress Co. He had no knowledge of his own that would indicate what grade of cotton the different marks represented, and he has further reason to believe, and does believe, that said cotton was exclusively marked by the said G. T. Potter's employees, acting under his exclusive
131 instructions.

He further states that the 18 bales cotton marked [G. M.] A *was* originally forwarded to "shipper's order," Oakdale, Mass., but no bill of lading was given at time of shipment and none subsequent thereto until the one was given on 30th of March, 1880, consigning the 18 bales aforementioned to shipper's order at East Douglas, Mass. At time of signing above-mentioned bill of lading a letter was at once forwarded, through the regular channels, directing that the 18 bales be forwarded from Oakdale to East Douglas, and on face of bill lading mentioned there is entered a clause cover-

ing all charges incident to the changing of destination. Deponent further states as his belief that the line delivering this cotton at Oakdale without the proper "shipper's order" endorsed on back of bill of lading is responsible to the holders of bill of lading dated March 30th, as it was the only bill [of] lading ever issued for the cotton mentioned.

JNO. J. O'CONNOR.

Subscribed and sworn to before me on this 16th day of June, 1880.
[SEAL.] WM. R. KELLY, *Clerk.*

132 "EXHIBIT A."

(Copy.)

TEXARKANA, ARK., *April 27th*, 1880.

Texarkana cotton compress Co., Texarkana, Ark.:

We demand immediate delivery to us of 33 bales cotton (as per statement below) for which this company has issued its bills of lading based on your guarantee, viz:

2	bales	cotton	marked	[R] Ca.
3	"	"	"	[R] Ca.
1	"	"	"	J. G. M.
1	"	"	"	G [M] J.
3	"	"	"	E. D. R.
22	"	"	"	[P P].
1	"	"	"	R. O. V.

You will be held strictly responsible for failure in delivery of any or all of above-mentioned 33 bales cotton.

JNO. J. O'CONNOR, *Ag't.*

133 (Copy.)

APRIL 27TH.

S. Frink, Esq., gen'rl fr't ag't.

DEAR SIR: Complying with your instructions (as per telegram att.) please find attached copy of notice served by me on compress Co. this date; also certificate of witnesses confirming the service. The notice was served upon the party in charge of the press, there being no other officer here. Torrance said he would send the notice to F. G. Martin, sup't. (now sojourning at Hot Springs), or hand it to Col. Paramore, who is expected here shortly.

Resp'y, JNO. J. O'CONNOR.

134 EXHIBIT H.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, GENERAL FREIGHT OFFICE,
ST. LOUIS, *July* 15, 1880.

B. B. & R. Knight, Providence, R. I.

GENTS: Replying to your favor of 13th we cannot admit that the carriers are responsible for the quality of the goods shipped over their lines. That is a matter between shipper and consignee.

We have promptly paid for losses on our line, and must leave the question as to whether the quality of the cotton shipped you by Mr. Potter was as represented to be adjusted between you and him.

Very resp'y, S. FRINK, *G. F. A.*

135 EXHIBIT I.

St. Louis, Iron Mountain & Southern R'y Co. to B. B. & R. Knight, Dr.

For 378 bales of cotton called for in the following bills of lading, dated Texarkana, Ark.:

1879.			
Dec. 16.	150 bales, R. O. V., 75,435, 1 c., 12¾		$9,617 96
20.	39 " [P P], 19,617, 12¾		2,501 17
23.	7 " [G. M.] S S, 3,535, 13⅛		463 97
"	60 " [S M] S S, 29,822, 12¾		3,839 59
"	100 " X X E, 53,000, 12⅝		6,691 25
1880.			
Jun. 22.	[S. M.] K, 11,211, 12⅞		1,443 40
			$24,557 34
	Less freight to Providence		2,212 67
			$22,344 67

CR.

By 365 bales of inferior cotton received in place of above cotton & sold at auction:

1880.			
Sep. 1.	75, R. O. V., 37,101, 9 3/16 c.	$3,408 65	
	74, 36,658, 9	3,299 22	
	17, [P P], 3,619, "	791 01	
	7, [G M] S S, 3,541, 9⅛	323 12	
	59, [S M] S S, 29,128, "	2,657 93	
	101, X X E, 50,471, 9	4,542 39	
	22, [S M] K, 10,448, "	940 32	
		15,962 64	
	Less freight	2,052 40	13,910 24
			8,434 43
	Insurance, freight, & auction expenses		652 26
			9,086 69
	Interest on 22,344.67 from 30 days after date of bill [of] lading to Sept 1, '80		819 67
	Interest on $9,086.69 from Sep. 1, '80, to Feb. 1, '84		1,902 15
			1',808 51

136 And thereupon the court, among other things, charged the jury:

"That the compress warehouse must be deemed the warehouse of the defendant. If you find from the proof that it was used by the defendant as the place for storing the cotton while the defendant was compressing the same—that is, if while the defendant was getting the cotton ready for shipment North it used the compress warehouse for the purpose of storage, then the compress warehouse must be deemed the defendant's warehouse for that pupose."

To which the defendant then and there excepted.

The court further charged the jury:

"If the proof in the case satisfies you that the defendant's agent knew or were informed at the time they shipped this cotton to the plaintiffs, or accepted it for shipment, that it was of a quality inferior to that called for by the bills of lading which the defendant had issued for it, and knew that the marks on those bales or packages had been changed from marks indicating a lower grade or
137 quality of cotton to marks indicating the grade called for by the bills of lading, then the defendant is liable in this action for the difference in value between the cotton of the quality called for by the bills of lading and the value of the cotton actually shipped—that is to say, if the proof satisfies you that the agent of the defendant connived at the substitution of lower and inferior quality of cotton in place of that called for by the bills of lading, although the marks may have been such as called for by the bills of lading, then the defendant is liable."

To which the defendant then and there excepted.

The court further charged the jury:

"If you are satisfied from the proof that the agents of the defendant knew at the time they received and shipped the 525 bales that it was inferior in quality to that called for by the bills of lading, and that fraudulent or false grade-marks had been put upon these bales corresponding to the marks called for by the bills of lading, then the defendant is liable.

138 "The defendant, as I have already stated to you, assumed the responsibility of a warehouseman in regard to this cotton, and while this cotton was being compressed and prepared for shipment was obliged to see to it that the cotton it had receipted for was kept on hand for shipment, and had no right knowingly to allow a lower grade of cotton to be substituted for that called for by the bills of lading."

To which the defendant then and there excepted.

The court further charged the jury: "There is a clause which has been referred to by counsel engaged in the trial upon the agreement in reference to the duty of the consignee under claims for damages—'Claims for damages must be reported by the consignee to the delivery line within thirty-six hours after the arrival of the freight at the place of the delivery indicated above.' As I construe this contract this clause does not govern this case and cuts no figure in regard to the rights of the plaintiffs in this case.

139 This is not a claim for damages within the meaning of that

clause, but it is a suit against the defendant for not having forwarded the cotton which was covered by its bills of lading. When the cotton arrived the plaintiffs were not bound to accept it at all, because it was as they claim, and if you find the testimony sustains their view of the case, it was not the cotton which the defendant had agreed to send them; if their theory of the case is sustained by the proof, they had no claim for damages; they simply repudiated the contract. They said: 'This is not our cotton; this is not the cotton we bought and paid for and you agreed to ship to us; we therefore put it in a warehouse and notify you that it is your cotton; if you don't take charge of it we shall direct it to be sold for account of whom it may concern.' But having directed it to be sold for account of whom it may concern, they had the money which was the proceeds of that cotton. But it is not a case where it is a claim for damages where goods came
140 forward injured, or in any bad condition, such as may make a claim for reclamation upon some one of the carriers in the line over which it has been transported."

To which the defendant then and there excepted.

The court was asked to give each of the following instructions to the jury, which the court refused to do, and the defendant then and there excepted:

1. That a bill of lading, though assignable, is not negotiable like bills of exchange or other commercial paper so as to cut off defences to it.

2. That bills of lading are both receipts and contracts; that so far as they acknowledge the delivery and acceptance of the goods they are mere receipts and only *prima facie* evidence that the carrier has received them.

3. That in this case it is competent for the defendant to show that it never received the goods of the quality which the plaintiffs claimed the bill of lading represent in this case.

141 4. That it is no part of the ordinary business of a common carrier to guarantee the quality of the goods it receives for carriage, and in the absence of express authority and affirmative proof thereof the agent, O'Connor, could not bind the defendant by any guaranty of the quality of the cotton it received for transportation.

5. That if the cotton in this case was not received for immediate transportation, but under an agreement or understanding that it was first to be compressed and was delivered to the compress company for that purpose, then the liability of the defendant during the time the cotton was awaiting compressment was that of a warehouseman, and not that of a common carrier, and so long as the cotton itself was not changed or injured the defendant carrier cannot be made liable for any changes that may have been made in the marks put upon such cotton by the shipper or his employees without the knowledge of the defendant or its agent duly authorized to assent to such changes.

6. If the jury believe from the evidence that by any arrangement or agreement between O'Connor and Potter, O'Connor was induced

to sign the bills of lading in question without having actually received for shipment cotton of the grade described in the bills
142 of lading for the purpose of enabling Potter by the negotiation of the same to raise money with which to buy other cotton, then he transcended the scope of his authority, and such bills of lading so issued are void as against the defendant, so far as any liability can arise from the marks on the bills of lading or upon the cotton.

7. That if by any arrangement or agreement with Potter, O'Connor was induced to sign and deliver to Potter the bills of lading in question before the cotton described therein was marked for shipment, and that Potter was permitted by such agreement afterwards from the cotton he then had or might thereafter place in the compress to mark up from time to time and turn over to the defendant for shipment cotton corresponding with the marks on said bills of lading, then said O'Connor in so doing transcended his authority as defendant's agent, and such bills of lading so issued are fraudulent and void.

And thereupon the jury rendered a verdict against the defendant; whereupon the defendant, by its counsel, then and there moved the court to set aside the verdict so rendered and grant a new trial of this cause, and filed the following reasons in writing for the motion, to wit:

143 *Motion for a New Trial.*

United States Circuit Court, Northern District of Illinois.

B. B. & R. KNIGHT
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO.

THE GREENVILLE MANUFACTURING COMPANY
vs.
THE SAME.

THE MANCHAUG MANUFACTURING COMPANY
vs.
THE SAME.

And now comes the said defendant, by Thomas J. Portis and Chas. H. Wood, its attorneys, and moves the court to set aside the verdicts in each of the above-entitled causes and grant new trials therein—

1. Because the evidence shows that at the time the bills of lading were executed by O'Connor there was no cotton in the possession of
144 either the defendant or the compress Co. containing the same marks that were placed on the bills of lading.

2. Because the evidence shows, so far as the defendant is concerned, that the entire lot of cotton bales were of inferior quality, and that the shipment of an equal number of bales called for by the bills of lading would be a satisfaction of the contract so far as the quantity and quality of the cotton is concerned.

3. Because the evidence clearly shows that neither the defendant or its agents knew the grade-marks of the cotton called for by the bills of lading at the time they were issued, and because it is immaterial, if they did not then know this, whether months afterward they received and shipped an inferior quality of cotton in place of that called for by the bill of lading.

4. Because the instruction of the court to the jury that "if the proof in the case satisfies you that the defendant's agents knew or were informed at the time they shipped this cotton to the plaintiffs or accepted it for shipment that it was of a quality inferior to that called for by the bills of lading which the defendant had issued for it, and knew that the marks on those bales or packages had
145 been changed from marks indicating a lower grade or quality of cotton to marks indicating the grade called for by the bills of lading, then the defendant is liable," etc., ignores the fact made vital to be found by other parts of the charge whether the defendant did have at the time of the execution of the bills of lading the identical cotton therein described, and because it impliedly tells the jury that though the defendant did not have cotton on hand of the identical grade and marks called for by the bills of lading at the time they were issued, but did have bales of an inferior grade and so marked, which it knew were afterwards changed so as to indicate grades called for by the bills of lading, then the defendant is liable.

5. Because the court in charging the jury "that after the issuing of a bill of lading by the defendant as a warehouseman or common carrier no collusive agreement or conduct between the defendant and Potter can be allowed to prejudice the plaintiffs' rights as holders of these bills of lading" in effect assumes that if there were any such collusive agreement the defendant would be bound by it; whereas, if any such agreement *were* made, the proof shows
146 it was made by O'Connor, and such an agreement by him, it is respectfully submitted, could in no manner bind the defendant, because wholly beyond his powers.

6. Because the court refused to give each of the written requests or instructions asked by the defendant.

THOS. J. PORTIS AND
CHAS. H. WOOD,
Att'ys for Def't.

But the court denied the motion, and gave judgment on the verdict against the defendant; to which decision of the court in denying such motion the defendant, by its counsel, then and there excepted.

And forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this its bill of exceptions, and prays that the same may be signed and sealed by the judge of the court pursuant to the statute in such case made, which is done accordingly this — day of May, A. D. 1884.

H. W. BLODGETT, *Judge.* [SEAL.]

(Endorsed:) Filed April 11, 1884. Wm. H. Bradley, cl'rk.

147 Afterwards, to wit, on the thirtieth day of April, A. D. 1884, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Supreme Court of the United States.

BENJAMIN B. KNIGHT and ROBERT KNIGHT

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Know all men by these presents that we, The St. Louis, Iron Mountain and Southern Railway Company, principal, and R. C. Kerens and R. J. Lackland, as sureties, of St. Louis, Missouri, are held and firmly bound unto Benjamin B. Knight and Robert Knight, of Providence, Rhode Island, in the sum of eighteen thousand dollars, to be paid to the said Benjamin B. Knight and Robert Knight, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 26th day of April, A. D. 1884.

Whereas the above-named St. Louis, Iron Mountain and Southern Railway Company hath prosecuted a writ of error in the Su-
148 preme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named St. Louis, Iron Mountain and Southern Railway Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[SEAL.] ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.
By H. M. HOXIE, *Third Vice-Pres't.*
R. C. KERENS. [SEAL.]
R. J. LACKLAND. [SEAL.]

Attest: S. D. BARLOW, *Ass't Sec'y.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

R. C. Kerens & R. J. Lackland, being duly sworn, depose and say — each for himself saith that he is worth the sum of over eighteen thousand dollars over and above all his just liabilities.

Sworn to before me this 25th day of April, 1884.

[SEAL.] JAMES HOLLAND,
U. S. Commissioner.

I, Samuel Treat, judge of the United States district court,
149 certify that the sureties in the foregoing bond are amply sufficient to secure the penalty thereof.

SAMUEL TREAT.

Approved:
H. W. BLODGETT, *Judge.*

Endorsed: Filed April 30, 1884. Wm. H. Bradley, clerk.

Afterwards, to wit, on the ninth day of May, in the adjourned May term of said court, A. D. 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

BENJAMIN B. KNIGHT *et al.*
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

On motion of the defendant, by *the* its attorney, — the time for it to file the bill of exceptions herein be extended to the nineteenth instant.

150 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein Benjamin B. Knight and Robert Knight are the plaintiffs and The St. Louis, Iron Mountain and Southern Railway Company is the defendant as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this thirtieth day of June, A. D. 1884.

WM. H. BRADLEY, *Clerk.*

151 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is before you in said circuit court between Benjamin B. Knight and Robert Knight, plaintiffs, and The St. Louis, Iron Mountain and Southern Railway Company, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said The St. Louis, Iron Mountain and Southern Railway Company, as by its complaint appears, and it *is* being fit that the error, if any there has been, should be duly corrected and full

and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein; that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1884, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the 108th year.

[Seal of Circuit Court U. S., Northern Dist. Illinois.]

WM. H. BRADLEY, *Clerk.*

[Endorsed:] Supreme Court of the United States. St. Louis, Iron Mountain and Southern Railway Co. *vs.* Benjamin B. Knight *et al.* Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

152 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

To Benjamin B. Knight and Robert Knight, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1884, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The St. Louis, Iron Mountain and Southern Railway Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. H. W. Blodgett, presiding judge in said cause, this 3d day of July, in the year of our Lord one thousand eight hundred and eighty-four.

H. W. BLODGETT, *Judge.*

Service accepted this 19 of July, 1884.

ROSENTHAL & PIERCE, *Pl'tiffs' Att'ys.*

[Endorsed:] Supreme Court of the United States. B. B. Knight *et al. vs.* The St, Louis, Iron Mountain and Southern Railway Co. Citation to October term, A. D. 1884.

Endorsed on cover: N. Illinois C. C. U. S. No. 283. The St. Louis, Iron Mountain and Southern Railway Company, plaintiff in error, *vs.* Benjamin B. Knight and Robert Knight. Filed 2nd September, 1884.

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JAMES H. MCKENNEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 283.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,

Plaintiff in Error,

against

BENJAMIN B. KNIGHT and ROBERT KNIGHT.

ARGUMENT FOR THE PLAINTIFF IN ERROR

BY

JOHN F. DILLON.

BURGOYNE'S "QUICK" PRINT, COR. WALKER AND CENTRE STS., N. Y.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886.

THE SAINT LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Plaintiff in Error, AGAINST BENJAMIN B. KNIGHT AND ROBERT KNIGHT.	No. 283.

Statement, Assignment of Errors and Argument for the Plaintiff in Error.

BY

JOHN F. DILLON,

Attorney for the plaintiff in error.

Statement of Case.

THE FOLLOWING STATEMENT of the case is substantially the statement of the Court in its charge to the jury (pp. 42–49), and although inaccurate in some particulars and not complete in others, it is sufficient to give the

Court a general view of the case. Other material facts will be referred to, in connection with the argument of the separate errors relied on.

The claim of the plaintiffs (defendants in error) in this case is, that the defendant Railway Company issued to one POTTER bills of lading for cotton consigned to POTTER's order, designated by certain marks indicating the grade or quality of the cotton; that POTTER drew drafts on the plaintiffs for certain sums of money, usually representing the purchase price of the cotton, less the cost of transportation, which drafts were duly paid by the plaintiffs, and that the defendant instead of shipping to the plaintiffs cotton of the quality called for by these bills of lading, shipped and sent forward to the plaintiffs cotton of an inferior quality; and this suit is brought for damages for failure to deliver cotton of the quality indicated in the bills (Record, fol. 102).

The proof tends to show that POTTER was a cotton broker at Texarkana, Arkansas, in the fall of 1879, and winter following; that he bought most of his cotton at points in Texas on the lines of railroad running south, southwest and west from Texarkana, and that it was brought thither by these railroads, and there delivered upon the platform of what is known in the testimony as the Cotton Compress Company; that this Compress Company was a corporation whose business it was to compress cotton, and that all the cotton bought by POTTER, and delivered at Texarkana was to be there compressed before it was shipped east and north by the defendant. This Compress Company had a large warehouse where cotton was stored until it could be compressed and made ready for shipment (fol 103).

The testimony shows the course of business to have been this: Cotton was bought by POTTER and delivered to him in the compress warehouse. It was there weighed, classed or graded by POTTER, and marks put upon each bale, indicating the grade or quality of the cotton and the lot to which it belonged. Potter made out bills of lading, describing certain bales of cotton by the marks on them. These bills were presented to O'CONNOR, the agent of the Railway Company at Texarkana; the superintendent of the Compress Company certified to the fact that the cotton called for by these bills of lading was in the warehouse, and the bills of lading thus certified to by the letters "O. K." and the signature of MARTIN, the superintendent of the compress warehouse, were then signed by O'CONNOR and delivered to POTTER, who drew drafts on the persons to whom he had sold cotton of the grade called for by these bills of lading, attached the bills to the drafts, and some local bank at Texarkana, or an adjacent town or city, cashed these drafts, and they went forward to some correspondent of such bank for collection, and in due course of mail, and long before the actual arrival of the cotton the drafts were paid.

Fols. 103, 104.

There is also testimony in the case given by POTTER himself, which tends to show that the bills of lading were issued upon cotton before it had been received into the warehouse upon some understanding or agreement between him and O'CONNOR that they should be so issued, and that POTTER would afterwards deliver for shipment the cotton corresponding to those bills (fol. 104). POTTER testifies: "I did not buy enough

cotton of the proper quality to meet the amount for which bills of lading had been issued" (p. 32, fol. 74).

The expense of compressing the cotton was paid for by the Railway Company out of its charges for transportation (fol. 105).

Some time necessarily elapsed between the arrival of the cotton in the compress warehouse and the time when it was compressed and made ready for shipment. Especially was this so in the fall and early part of the winter when there was a large rush of cotton, and it was impossible to compress and handle the cotton as fast as it came in. It, therefore, accumulated in large quantities in the warehouse awaiting compression and getting ready for shipment. When it was ready to be forwarded, it was turned out upon what was known as the loading platform and was thence shipped to such consignees *as* POTTER, *directed*, *i. e.*, bills of lading having been given to various persons (?) POTTER directed to whom he would have each lot as it was turned out ready for shipment sent or forwarded (fol. 105).

There is testimony tending to show that after one of the bills in question had been signed POTTER changed the shipping marks upon 50 or 100 bales of cotton of the quality used by the KNIGHTS, and which he had directed to them, and placing other shipping marks upon them, sent them subsequently to other parties (fol. 41).

The controversy in this case is wholly in regard to 525 bales of cotton, covered by the eight bills of lading offered in evidence. P. 43, fols. 105, 106. Note that plaintiffs only sue upon 5 bills of lading for 378 bales only.

These bills covered a large amount of other cotton, which it is conceded was received in due course of busi-

ness, and answered to the marks of quality which were upon the bales; but it is claimed on the part of the plaintiffs that 525 bales of the whole number covered by the bills were not of the quality called for by these bills, and the suit is wholly in regard to the bales of proper quality which should have been delivered under the bills (fols. 105, 106).

The Court admitted testimony tending to show that, on or about April 9, 1880, there was still a deficiency of 525 bales, distributed among these bills; that upon that day there remained in the compress warehouse some 800 bales of cotton of an inferior grade to that indicated by the marks called for by these bills of lading, and that certain employees of POTTER, without the knowledge of O'CONNOR, the defendant's freight agent, as defendants claimed, re-marked this cotton with marks indicating the grade or quality called for by the bills of lading; and that the defendant receiving it upon the loading platform, as and for the cotton yet due upon the bills, forwarded this inferior cotton to the plaintiffs, instead of the actual quality called for by the bills (p. 44).

The plaintiffs' proof tends also to show that when this inferior cotton arrived at its destination, Providence, Rhode Island, plaintiffs declined to accept it, caused it to be put into an auction house, and sold it for the benefit of whom it might concern, having notified the defendant of the sale before it took place; and this suit is now brought against the Railway Company, *as carrier*, for failure to deliver 378 bales of cotton of the quality indicated in the bills of lading (fol. 107). The suit is not against the defendant, as warehouseman, for failure to keep safely goods belonging to the plaintiffs and entrusted to its care; nor is it an action for

fraud. *The entire claim as contained in the declaration is for breach of a contract to carry and deliver to plaintiffs certain 478 bales of cotton of a particular quality alleged to have been received by it for that purpose.*

The action was begun December 19, 1882, in the Superior Court of Cook County, Illinois, removed thence to the Circuit Court of the United States for the Northern District of Illinois, on February 26, 1883, and so proceeded that judgment was rendered in said Circuit Court upon the 11th day of April, 1883, in favor of the plaintiffs and against the defendant, for the sum of $11,808.51 damages to the plaintiffs by reason of said failure of the Railway Company to deliver the cotton of the quality indicated in the bills of lading. From this judgment a writ of error issued to said Circuit Court at the instance of the defendant, and the cause now comes before your Honors upon the following:

Assignment of Errors.

The Court below erred,

1. In giving the jury each of the following separate instructions:

"That the compress warehouse must be deemed the warehouse of the defendant. If you find from the proof that it was used by the defendant as the place for storing the cotton while the defendant was compressing the same—that is, if while the defendant was getting the cotton ready for shipment North it used the compress warehouse for the purpose of storage, then the compress warehouse must be deemed the defendant's warehouse for that purpose.

"If the proof in the case satisfies you that the defendant's agents knew or were informed at the time

they shipped this cotton to the plaintiffs, or accepted it for shipment, that it was of a quality inferior to that called for by the bills of lading, which the defendant had issued for it, and knew that the marks on those bales or packages had been changed from marks indicating a lower grade or quality of cotton to marks indicating the grade called for by the bills of lading, then the defendant is liable in this action for the difference in value between the cotton of the quality called for by the bills of lading and the value of the cotton actually shipped—that is to say, if the proof satisfies you that the agent of the defendant connived at the substitution of lower and inferior quality of cotton in place of that called for by the bills of lading, although the marks may have been such as called for by the bills of lading, then the defendant is liable."

"If you are satisfied from the proof that the agents of the defendant knew at the time they received and shipped the 525 bales that it was inferior in quality to that called for by the bills of lading, and that fraudulent or false grade marks had been put upon these bales corresponding to the marks called for by the bills of lading, then the defendant is liable. The defendant, as I have already stated to you, assumed the responsibility of a warehouseman in regard to this cotton, and while this cotton was being compressed and prepared for shipment was obliged to see to it that the cotton it had receipted for was kept on hand for shipment, and had no right, knowingly, to allow a lower grade of cotton to be substituted for that called for by the bills of lading."

To each of which said instructions as found in the record at pages 58, 59, the defendant duly excepted.

2. In refusing to give to the jury each of the following instructions:

1. That a bill of lading, though assignable, is not negotiable like bills of exchange or other commercial papers so as to cut off defenses to it.

2. That bills of lading are both receipts and contracts; that so far as they acknowledge the delivery

and acceptance of the goods they are mere receipts and only *prima facie* evidence that the carrier has received them.

3. That in this case it is competent for the defendant to show that it never received the goods of the quality which the plaintiffs claimed the bills of lading represent in this case.

4. "That it is no part of the ordinary business of a common carrier to guarantee the quality of the goods it receives for carriage, and in the absence of express authority and affirmative proof thereof, the agent O'Connor could not bind the defendant by any guarantee of the quality of the cotton it received for transportation."

5. That if the cotton in this case was not received for immediate transportation, but under an agreement or understanding that it was first to be compressed, and was delivered to the compress company for that purpose, then the liability of the defendant during the time the cotton was awaiting compressment was that of a warehouseman, and not that of a common carrier, and so long as the cotton itself was not changed or injured the defendant carrier cannot be made liable for any changes that may have been made in the marks put upon such cotton by the shipper or his employees without the knowledge of the defendant or its agent duly authorized to assent to such changes.

6. If the jury believes from the evidence that by any arrangement or agreement between O'Connor and Potter O'Connor was induced to sign the bills of lading in question without having actually received for shipment cotton of the grade described in the bills of lading for the purpose of enabling Potter by the negotiation of the same to raise money with which to buy other cotton, then he transcended the scope of his authority, and such bills of lading, so issued, are void as against the defendant, so far as any liability can arise from the marks in the bills of lading, or upon the cotton.

7. That if by any arrangement or agreement with Potter O'Connor was induced to sign and deliver to Potter the bills of lading in question before the cotton described therein was marked for shipment, and that Potter was permitted by such agreement afterwards from the cotton he then had or might thereafter place in the compress to mark up from time to time and

turn over to the defendant for shipment cotton corresponding with the marks on said bills of lading, then said O'Connor in sodoing, transcended his authority as defendant's agent, and such bills of lading so issued are fraudulent and void.

To which said refusal to charge each of said seven requests, as found in the Record at pp. 59, 60, the defendant duly excepted.

3. In denying defendant's motion for a new trial, as found in the Record at pp. 60, 61, to which decision the defendant duly excepted.

4. In entering judgment for difference in value in the quality of 525 bales of cotton, instead of 378, the number sued for, as found in the Record at p. 17.

Argument.

As above stated, this is solely an action for damages for breach of contract by the defendant Railway Company, as carrier, to deliver to the plaintiffs 378 bales of cotton, of a particular quality indicated by certain marks in the bills of lading issued therefor, and alleged to have been received by it for transportation. Under this claim the Court below charged the jury that the defendant might be held liable upon any of the following grounds:

1. Upon the bills of lading themselves, by way of estoppel, independent of the actual receipt for transportation by the Railway Company of the goods therein described.

2. As warehouseman, and therefore before the bills of lading took effect, for any dereliction of duty in that capacity, and especially for any failure to have the goods so intrusted to it, applied properly to these bills of lading and carried thereunder.

3. For any connivance or fraud on the part of its agent, O'Connor, whereby the marks upon the bales actually shipped were altered before shipment and forwarded as and for cotton of the quality indicated by the marks in the bills of lading.

We maintain that the Circuit Court erred in each of these particulars and in support of our position and as grounds for a reversal of the judgment, we submit the following argument:

I.

The agent of the Railway Company had no authority to issue bills of lading for cotton not actually received by him for transportation; and bills so issued can impose no liability upon the Railway Company to deliver the goods therein described; but it may be shown even as against an innocent endorsee for value, that such goods were never received for carriage.

Defendant made among others, the following requests to charge (1st, 2nd, 3rd, 6th and 7th Requests, Record, p.p. 59, 60):

1. That a bill of lading, though assignable, is not negotiable like bills of exchange or other commercial papers so as to cut off defenses to it.

2. That bills of lading are both receipts and contracts; that so far as they acknowledge the delivery and acceptance of the goods they are mere receipts and only *prima facie* evidence that the carrier has received them.

3. That in this case it is competent for the defendant to show that it never received the goods of the quality which the plaintiffs claimed the bills of lading represent in this case.

6. If the jury believes from the evidence that by any arrangement or agreement between O'Connor and Potter O'Connor was induced to sign the bills of lading in question without having actually received for shipment cotton of the grade described in the bills of lading for the purpose of enabling Potter by the negotiation of the same to raise money with which to buy other cotton, then he transcended the scope of his authority, and such bills of lading, so issued, are void as against the defendant, so far as any liability can arise from the marks in the bills of lading, or upon the cotton.

7. That if by any arrangement or agreement with Potter O'Connor was induced to sign and deliver to Potter the bills of lading in question before the cotton described therein was marked for shipment, and that Potter was permitted by such agreement afterwards from the cotton he then had or might thereafter place in the compress to mark up from time to time and turn over to the defendant for shipment cotton corresponding with the marks on said bills of lading, then said O'Connor in so doing transcended his authority as defendant's agent, and such bills of lading so issued are fraudulent and void.

Each of these requests was refused and the defendant excepted. We urge that this refusal to charge was error.

Nothing in substance or effect like these requests was given in the Court's own charge. These requests were pertinent and material under the testimony, and hence,

if they were sound law, the refusal to give them was error.

According to the testimony of POTTER (Rec., pp. 29, 30), and of his clerk, J. M. HENDERSON (Rec., p. 23), O'CONNOR, under the agreement with POTTER, issued these bills of lading for cotton then not yet arrived in Texarkana, upon POTTER's surrender of the Texas Pacific local bills, and also placing under O'CONNOR's control an equal number of bales of inferior cotton. The HENDERSON brothers, plaintiff's witnesses, say that they were all the while filling up bills of lading which had been previously issued, presumably by O'CONNOR, and although they admit that at the time when these bills were issued, there was in the compress warehouse cotton of the quality indicated by the marks in the bills, yet they assert that as it was intended for other prior bills, the cotton for which O'CONNOR then signed was not present (Rec., pp. 23, 41).

This was the case made by the plaintiff's own witnesses.

For O'CONNOR to issue bills in this manner for cotton, which was not in his possession, for transportation, and in accepting an equal number of bales of inferior cotton as security, was in effect loaning to POTTER the credit of the Railway Company. He proceeded upon the unauthorized course of issuing bills of lading for cotton which *as to him and the Railway Company was not yet in existence;* thereby enabling Potter to obtain the value of his cotton before it had arrived even in Texarkana, by procuring advances upon the faith of the bills which POTTER immediately attached to his drafts upon the consignee.

Upon this theory of the case it is too evident to admit of dispute, that the cotton called for by bills had not, at the time when they were issued, even arrived at Texarkana, and much less, therefore, had it come into O'CONNOR's hands *for transportation*.

Let us now take O'CONNOR's version of the matter, and see whether even then he had any greater authority to issue the bills.

He says (Rec., pp. 33, 34) that he issued them only upon the guarantee of MARTIN, the superintendant of the compress, that there was at the time cotton of the proper grade to fill out these bills, lying in the warehouse. He trusted to MARTIN in this matter, and was indeed, obliged to do so, because of his own ignorance of the cotton business (Rec., p. 37).

MARTIN testified (Rec., pp. 38, 39) that he did not go in person to see that the cotton in the warehouse corresponded with the grades indicated by the marks in the bills, but had a clerk attend to it.

Now, considering J. M. HENDERSON's positive testimony (Rec., p. 23) that:

When these bills were signed *the cotton which they represented* had not yet arrived at the warehouse, and was not marked therefore for shipment, it is evident that MARTIN's clerk simply mistook cotton of the same quality which was to be sent forward to fill out consignments for which O'CONNOR had previously given bills of lading, for that which he sought, and so returned to MARTIN that the invoices were correct.

BUT EVEN IF WE ADMIT THE POSITION that there was at the time of the issue of each of the bills of lading in question sufficient unconsigned cotton of the proper grade in the warehouse to fill out the bills, the prac-

tical result is that *at most* O'CONNOR issued bills of lading for cotton while it was in the compress warehouse awaiting compression, and consequently before it was turned over to him by POTTER for transportation.

As a logical result we find that O'CONNOR issued the bills of lading *before the commencement of the liability of the defendant as common carrier*, and before the cotton described in the bills was "actually loaded or taken for transportation." And this being true, it matters not *where* the cotton was, so long as it was not in his hands *for transportation under the bills.*

That bills so issued are invalid as an unauthorized assumption of power not delegated to the agent, unless by special instruction, and a fraud upon the Railway Company which releases it from all liability upon the goods mentioned therein, even at the suit of a *bona fide* endorsee for value, has been so repeatedly held by the Courts both of England and America, as to render the law upon the subject unassailable, and the question of reliance by the consignee upon the faith of the bill of lading, or whether he trusted to the honesty of the consignor, is wholly immaterial, and does not in the slightest degree affect the carrier's liability for non-delivery of goods which it never received for shipment under the bills.

Lickbarrow vs. Mason, 2 T. R., 77.
Grant vs. Norway, 2 Eng. L. and Eq., 337.
Hubbersty vs. Ward, 18 *Id.*, 551.
BROWN vs. Powell Duffryn Co., L. R., 10 C. P., 562.
The Freeman vs. Buckingham, 18 How., 182.
The Loon, 7 Blatchf., 244.
Robinson vs. Memphis, &c., Ry. Co., 9 Fed. R., 129; S. C., 16 Fed. R., 57.

Pollard vs. Vinton, 105 U. S., 7.
Sears vs. Wingate, 3 Allen, 103.
B. & O. R. R. vs. Wilkens, 44 Md., 11.
Hunt vs. Miss. Cent. R. Co., 29 La. Ann., 446.
Louisiana Bank vs. Laveille, 52 Mo., 380.
See Chandler vs. Sprague, 38 Am. Dec., 407, note.
Cox vs. Bruce, L. R., 18 Q. B. Div., 147 (Dec. 6, 1886).

The principle was first laid down in Lickbarrow vs. Mason, where BULLER, J., makes use of the following language in giving the opinion of the Court:

"A bill of lading is an acknowledgment by the captain of having received the goods *on board his ship;* therefore it would be a fraud in the captain to sign such a bill of lading, if he had not received goods on board, and the consignee would be entitled to his action against the captain for his fraud."

The point came up rather more clearly in the case of Grant vs. Norway, *ut supra,* where Lord Chief-Justice JERVIS says, upon p. 341:

"The general usage gives notice to all people that the authority of the captain to give bills of lading *is limited to such goods as have been put on board, and the party taking the bill of lading either originally or by endorsement of the goods, which have never been put on board, is bound to show some particular authority to the Master to sign the bill in that form.*"

This is a leading case, and has been followed in the later English decisions down to and including Cox vs. Bruce, *ut supra,* decided last December, and in the Federal and State Courts of the United States generally.

The earliest Massachusetts case, *Walker vs. Brewer,*

11 Mass., 99, was, however, decided before Grant vs. Norway, though enunciating the same doctrine.

The Supreme Court adopted this view first in the case of *The Freeman vs. Buckingham*, in 18 Howard.

Says Mr. Justice CURTIS, upon p. 191:

"But the master of a vessel has no more an apparent, unlimited authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority if the ship be a general one, to sign bills of lading for cargo *actually shipped* and he has also authority to sign a bill of sale of the ship, when, in case of disaster, his power of sale arises; but the authority in *each case*, arises out of and depends on a particular state of facts: it is not an unlimited authority in the one case more than in the other, and his act in either case does not bind the owner, *even in favor of an innocent purchaser;* if the facts upon which his power depended did not exist; *and it is incumbent upon those who are about to change their condition upon the faith of his authority to ascertain the existence of all the facts upon which his authority depends.*"

In the late case of Pollard vs. Vinton, 105 U. S., 7, Mr. Justice MILLER, following this decision, lays down the following "*elementary truths*" which fitly express the philosophy of the entire doctrine.

He says (p. 8), of the nature and character of a bill of lading:

"It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property *on board* his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. *The receipt of the goods lie at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.*"

Commenting upon *The Freeman vs. Buckingham*, he then continues (p. 11):

"And we are unable to see why this case is not con-

clusive of the one before us, unless we are prepared to overrule it squarely. *The very question of the power of the agent to bind the owner by a bill of lading for goods never received and of the effect of such a bill of lading as to innocent purchasers without notice were discussed and properly within the case and were decided adversely to the principles on which the plaintiff's counsel insist in this case.*"

In B. & O. R. R. vs. Wilkens, 44 Md., at p. 23, MILLER, J., says:

"If any doctrine of commercial law can be regarded as well settled it is that the master has no authority to sign a bill of lading for goods *not actually put on board* the vessel, and, therefore, the owner of the ship is not responsible to parties taking or dealing with or making advances on the faith of such an instrument, which is untruthful in this particular."

In Wingate vs. Sears (3 Allen, 103), Judge HOAR lays down the rule thus (p. 107):

"When the master is acting within the limits of his authority, the owners are estopped in like manner with him; *but it is not within the general scope of the master's authority to sign bills of lading for any goods not actually on board.*

(*Ib.*, p. 108): "The giving a bill of lading for goods which are not shipped, whether separately or by including them with others actually on board, is a violation of the master's duty and unwarranted by his employment. The responsibility of the owners to the consignee unless the shipper is the agent of the consignee, is not upon the contract, but *results exclusively* from the possession of the goods *under an obligation to deliver* them safely to their owner."

These cases lay down the above doctrine in the fullest and broadest manner, and although the leading cases upon the point are, as has been observed, for the most part admiralty cases, in which the party signing the bill is usually the captain or agent of the ship-

owners, and the bills themselves, therefore, marine instruments; yet the rule applies as well to railroad bills, such as are here in suit.

B. & O. R. R. Co. vs. Wilkens, 44 Md., 11.
Robinson vs. Memphis, &c., R. Co., 9 Fed. R., 129; S. C., 16 Fed. R., 57.
Hunt vs. Miss. Cent. R. Co., 29 La. Ann., 446.
Miller vs. Hannibal & St. Jo. R. R. Co., 90 N. Y., 430.

Says MILLER, J., in B. & O. R. R. Co. vs. Wilkens, at p. 25:

"A bill of lading is a very ancient, but not exclusively a *sea*, document. It has been long used in both countries by carrying companies in transportation on lakes and rivers, by steamboats as well as sailing vessels, and on canals, and in all such cases it has been demonstrated and treated as a commercial instrument. In later times similar documents have been commonly, if not universally, used by railway companies in land carriage. What good reason exists why the principle should not apply to them, as well as to bills of lading used in shipping? We see none."

In Robinson vs. Memphis, &c., R. Co., 9 Fed. R., 129, the case was this: The freight agent of the railroad company, by the procurement of one Chiles, a cotton buyer, signed a bill of lading for certain bales of cotton, which were not on hand at the time, and were never delivered to the railroad company for carriage. Plaintiffs, the consignees, having paid the draft upon the faith of the bill, sued the railroad for non-delivery of the cotton. The Court held that there could be no recovery. Says HAMMOND, Dist. J. (p. 137):

"Therefore, it seems to me plain, that the agent's authority, actual and apparent, was limited to issuing

bills of lading on goods in hand, and all else was outside his authority."

(*Ib.*, p. 138): But there being no goods *delivered to the carrier* no agency to sign a bill of lading is called into being; indeed there is no carrier, for there are no goods to be carried. There is a ship or a railroad, but it is not as to any given persons a carrier without the goods, *and it is only as carrier that a bill of lading in the nature of the thing binds this company as owner.*"

THERE ARE SEVERAL CASES IN THIS COUNTRY among which may be cited:

The L. J. Farwell, 8 Biss., 61.
Rowley vs. Bigelow, 12 Pick., 307.
Robinson vs. Memphis, &c., R. R. Co., 16 Fed. Rep., 57;

which lay down the rule that although the agent exceeded his authority by issuing bills of lading for goods not yet received by him, for transportation, yet if they are subsequently so delivered by the consignor *as and for those named in the bill*, it relates back and includes them, and the carrier is liable upon the bills for their safe carriage and delivery.

Robinson vs. Memphis & R. R., cited above, 16 Fed. R., 57, is a motion for a new trial of the same case, reported 9 Fed. R., 129. Upon the trial it was proved that the goods had been received for transportation, by the agent of the railroad company subsequent to the issue of the bills of lading as and for the goods described therein, and it was held in the decision of the motion that the bills were not altogether invalid, but took effect upon the goods after their delivery to the carrier to be forwarded, and the carrier was bound in

the same manner as if they had been originally delivered.

Now, the above cases show : (1) That *as to the cotton indicated in the bills of lading* in suit, and which was never delivered to O'Conor for transportation, the bills are void and the railroad company is not liable ; and

(2) That the bales which were turned out upon the loading platform, after having been all marked by the Hendersons, and which were actually delivered *for transportation under the bills*, were those which the carrier as such accepted, and was bound to deliver safely at their destination.

In other words, the great principle underlying all the decisions is that the carrier is bound, as such, only upon goods which have actually been received *for carriage*.

The delivery to the carrier for transportation was made by POTTER upon the loading platform of the Railway Company, and from the time of such delivery did the liability of the carrier attach, the bills taking effect upon those goods which were so placed upon the platform for shipment thereunder, and upon those alone. As to the cotton which POTTER *should have sent* to the plaintiffs the bills never came into being because the relation of the Railway Company to them as carrier for the plaintiffs never existed. To hold otherwise would be in direct contradiction to the charge of the Circuit Court (Rec., p. 44) that the relation of carrier was only created upon the delivery of property for transportation ; and we submit that it is manifest error to hold that before that relation is created and while the Railway Company is at most only a warehouseman, it can be held liable upon an instrument which is in-

separably connected with it *as carrier* and co-extensive with its liability in that capacity.

Plaintiffs sue the Railway Company for the non-delivery of certain cotton alleged to have been received by it *as carrier*, and we insist that the fundamental factor in the constitution of this cause of action is the fact of the receipt of the undelivered cotton by the carrier for transportation under the bills. Such receipt by the Railway Company never took place and the record shows it. Therefore the basis upon which this cause of action must rest is wanting, and the suit must therefore inevitably fail, and the refusal of the Circuit Court to charge defendant's third request was error.

THIS ERROR FURTHER APPEARS from the charge of the Court (fols. 112, 113, 115, 119) which erroneously made the liability of the defendant depend upon the knowledge of O'Connor that the cotton shipped long after the bills were issued, was inferior in quality to that called for by the bills, there being no such issue.

II.

By the insertion of the words "Contents unknown," in the bills of lading, the Railway Company expressly exonerated itself from all liability in regard to the quality of the cotton which it received and carried under these bills, and in the absence of evidence to the contrary cannot be held responsible for non-delivery of the

cotton sued for, upon a warranty that the cotton carried should be of the quality indicated in the bills, and by the marks upon the bales themselves.

Although entirely outside of any issue in the pleadings, yet it was and is claimed by the plaintiffs that although the Railway Company did not as matter of fact receive for transportation the cotton called for by the bills, yet by the acceptance of other cotton bearing the same marks as contained in the bills of lading, it admitted the receipt of cotton of the grade indicated by those marks, and in effect warranted *that cotton* to be of such quality, and that the carrier is deemed in law to have received the cotton, for non-delivery of which this suit is brought, and is consequently liable, and the doctrine of Grant vs. Norway does not apply.

This raises the question as to whether the railway company did by such receipt of the inferior cotton and carriage of the same under these bills of lading warrant that the quality was as indicated by the marks upon it. For if there was any such warranty, it effected in law a delivery to the carrier of the cotton of the *quality* called for by the bills operating by way of estoppel; and if there was no such warranty the defendant cannot be held liable, not having *even constructively* received the cotton, for the non-delivery of which this suit is brought.

NOW, WE INSIST that by the insertion of the words "contents unknown," in the body of the bills, the railway company expressly negatived all warranty of the contents, or quality of the contents, of the packages or

bales actually carried under the bills, and that it cannot then be affected with even constructive acceptance of the cotton called for by the bills, and is therefore not liable upon any such ground.

The Circuit Court was accordingly asked by the defendant to charge the jury as follows: (4th Request to charge. Rec., p. 59).

"That it is no part of the ordinary business of a common carrier to guarantee the quality of the goods it receives for carriage, and in the absence of express authority and affirmative proof thereof the agent O'Connor, could not bind the defendant by any guaranty of the quality of the cotton it received for transportation."

This was refused and an exception taken to the ruling, and we now assign error to the refusal so to charge. On the contrary, the Court charged that if O'Connor knew in April that the cotton then shipped was inferior in quality to that called for by the bills of lading, the defendant was liable (fols. 112, 113, 115, 119).

The Railway Company did not, in the the absence of evidence to the contrary (and there is no such evidence) by the mere issue of the bills of lading, and the receipt of the 525 bales of inferior cotton for transportation thereunder, warrant that the quality of the goods shipped, was as indicated by the marks in the margin of the bills, and upon the bales themselves, after they had been delivered to O'Connor upon the loading platform for transportation to the Knights, but only acknowledged the receipt for transportation of *certain packages or articles purporting to be bales of cotton*, and bearing certain marks. As to the contents of the bales there is no warranty whatsoever, either as matter of fact or implied by law; for it is expressly negatived

by the insertion of the phrase "contents unknown" in the body of the bill.

Haddow vs. Parry, 3 Taunt., 303.
Jessel vs. Bath, L. R., 2 Exch., 267.
Lebeau vs. General Steam Nav. Co., L. R., 8 C. P., 88.
Clark vs. Barnwell, 12 How., 272.
The Columbo, 3 Blatchf., 521.
Vaughan vs. 630 Casks of Sherry Wine, 7 Ben., 506, 509.
S. C., 14 Blatchf., 517.
Bissell vs. Price, 16 Ills., 408.
Barrett vs. Rogers, 7 Mass., 297.
Shepard vs. Naylor, 5 Gray, 591.
Miller vs. Hannibal & St. Jo R. R. Co., 90 N. Y., 430.
Cox vs. Bruce, L. R., 18 Q. B. Div., 147.
Abbott on Shipping, 324.
Scrutton on Charter Parties and Bills of Lading (1886), pp. 99, 100.
Wood on Interpretation of Mercantile Agreements (1886), §§ 186, 188.
Hutchinson on Carriers, §123.

The rule is thus formulated by Mr. Scrutton in his late work upon Charter Parties and Bills of Lading at p. 99, Art. 53:

"The insertion of either of these clauses ('weight, value and contents unknown,' and 'quality and quantity unknown,') in the bill of lading by the master or broker repudiates his liability for any description of the weight or contents of the goods contained in the bill of lading; but he is bound to carry and deliver safely the goods received by him, whatever their weight or contents may be."

The earliest case upon the subject was Haddow vs. Parry *ut supra*, where LORD MANSFIELD says:

"If the master qualifies his acknowledgment by the words 'contents unknown' *he acknowledges nothing.*"

This case is followed by many cases in England, among which is Lebeau vs. General Steam Nav. Co. (L. R., 8 C. P., 88), where the clause in the bill was "weight, value and contents unknown." In delivering the opinion, BOVILL, C. J., says:

"By the printed memorandum, in my opinion they (the Navigation Company) repudiated all knowledge of the contents of the case, and all intention of contracting with regard thereto, and contracted to carry the package, whatever its contents might be."

Accordingly, in the absence of fraud on the part of the consignor, the carrier was only allowed to charge the rate for linen goods, which the bill of lading stated that the case contained, although it was afterwards found to contain silk, for which the freight was higher.

A leading case upon the subject in this Court is *Clark vs. Barnwell* (12 Howard, 272), where MR. JUSTICE NELSON, for the Court, construing a bill of lading containing the words "contents unknown," says (p. 283):

"It is obvious, therefore, that the acknowledgement of the master as to the condition of the goods when received on board extended only to the external condition of the cases, excluding any implication as to the quantity *or quality* of the article, condition of it at the time received on board, or whether properly packed or not in the boxes. Abbott, 339 (Shee's Ed.), p. 216 (Story's Ed.)."

In a late case in New York, Miller vs. Hannibal and St. Jo. R. R. Co., 90 N. Y., 430, the agent of the railroad company gave a bill of lading for a certain num-

ber of barrels of eggs, the bill containing the usual phrase, "contents unknown." When the barrels arrived and were delivered to the consignees, they were opened and found to contain sawdust only.

Says ANDREWS, C. J., upon p. 432:

"Taking the whole instrument together, it imports only that the defendants had received thirty package described as containing, or purporting to contain eggs, but the actual contents of which were to the defendant unknown."

And again, he says, upon p. 433:

"The agent simply certified in effect that they were described as containing eggs, accompanying this with the statement that the contents were in fact unknown. *The plaintiffs in making the advances were chargeable with knowledge of the contents of the bill of lading, and must be deemed to have relied upon the assurance of the shipper as to the contents of the package.*"

The latest English case, Cox vs. Bruce, L. R., 18 Q. B. Div., 147 (decided December, 1886), is in point, and indeed much stronger than the case at bar, because the error was in part regarding the marks *on the outside* of the bales.

The facts were these:

A bill of lading, signed by the captain of a ship in respect of a shipment of jute ("weight, contents and value unknown"), described the bales as marked in proportions specified, with certain quality marks, indicating different grades of jute, which marks corresponded with those inserted in the shipping notes made out by the shippers. When the ship was discharged, however, it was found that there had in fact been shipped fewer bales marked with one of such quality marks, and more marked with another of such

marks indicating an inferior quality, than stated in the bill of lading.

In an action against the shipowners for non-delivery of the jute of the quality called for by the bill of lading, they were held not liable.

Says LORD ESHER, M. R. (pp. 151, 152):

"But, then, secondly, it is said that, because the plaintiffs are indorsees for value of the bill of lading without notice, they have another right that they are entitled to rely on a representation made in the bill of lading that the bales bore such and such marks, and that there is consequently an estoppel against the defendants. That raises a question as to the true meaning of the doctrine in *Grant vs. Norway*. It is clearly impossible, consistently with that decision, to assert that the mere fact of a statement being made in the bill of lading estops the shipowner and gives a right of action against him if untrue, because it was there held that a bill of lading signed in respect of goods not on board the vessel did not bind the ship-owner. The ground of that decision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitations of the captain's authority are well known among mercantile persons, and that he is only authorized to perform all things usual in the line of business in which he is employed. Therefore, the doctrine of that case is not confined to the case where the goods are not put on board the ship. That the captain has authority to bind his owners with regard to the weight, condition and value of the goods under certain circumstances may be true; but *it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill of lading so as to bind his owners, the particular mercantile quality of the goods before they are put on board*, as, for instance, that they are goods containing such and such a percentage of good or bad materials, or of such and such a season's growth. *To ascertain such matters is obviously quite outside the scope of the func-*

tions and capacities of a ship's captain and of the contract of carriage with which he has to do."

O'CONNOR "had no authority to make rates of freight; there was no difference in the rate of freight between good and poor cotton" (Record, p. 36, fol. 86).

The foregoing cases then show the views of the Courts generally, and hold conclusively that there can, in a case like ours, be no warranty of contents or quality, and that there is no estoppel therefore to preclude the defendant from showing that goods *of the quality* described by the marks in the bills of lading were never received for shipment.

WE SUBMIT, that there is then no liability imposed upon the Railway Company by reason of any warranty that the contents of the bales shipped should be as the marks upon them, and in the bills under which they were sent, indicated, since that was expressly repudiated by the insertion of the words "contents unknown;" and that, therefore, the Circuit Court erred in refusing to charge defendant's 4th request (Rec., p. 59), and the exception to said refusal was well taken.

This request ought to have been given, and if given the verdict of the jury could not have been for the plaintiffs.

III.

As to all cotton in the compress warehouse, and until its actual delivery upon

the loading platform for shipment, the Railway Company can at most be deemed only a warehouseman, and its liability as such cannot be inquired into in this action. It was not in issue.

The Circuit Court instructed the jury (Rec., p. 44) that the liability of the Railway Company as common carrier did not commence "until the property was actually loaded or taken for transportation."

but that it must until then be considered as warehouseman; and this is so for two reasons:

First. The cotton was not then in the hands of the Railway Company for immediate transportation, and

Second. The vendor Potter still exercised actual control over it, inasmuch as he had still something further to do with it, viz., mark it for shipment, set it apart into lots, have it compressed, and finally turned out upon the loading platform for transportation with proper directions as to the destination of each lot, and thus place it *entirely* within the control of the carrier. Until such delivery for transportation was made Potter was in actual control of the cotton, and only after it was turned out upon the loading platform did the cotton handlers of the railway company assume control over it and load it into the cars, thereby imposing upon the company the liability of a common carrier, *in which character alone* it is sued.

Says Hutchinson on Carriers, § 82:

"The delivery must be complete. The duties and obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the

exclusive duty of seeing to their safety. The law will not divide the duties or the obligation between the carrier and the owner of the goods (Brind vs. Dale, 8 C. & P., 207); it must rest entirely upon one or the other; and until it becomes imposed upon the carrier by a delivery and acceptance he cannot be held responsible for them."

(*Ib.*, § 88): "The delivery must be to the carrier or his agent for immediate transportation, for if the goods be delivered to him to be stored by him for a certain time, or until the happening of a certain event, *or until something further is done to prepare them for transportation, or until further orders are received from the owner*, the carrier becomes a mere depository or bailee until the appointed time has expired, or other contingency happened upon which the carriage is to commence, or until further orders have been given, as the case may be, for nothing could be more unjust than to permit the owner of the goods to impose upon a mere depository or warehouseman, *whether he has just become related to the goods as carrier or not*, the extremely hazardous responsibility of the common carrier, so long as it might suit his interest or commence to do so."

(*Ib.*, § 63): "But if *a person, who is at the same time both a warehouseman and a forwarding merchant*, receive goods on deposit to be forwarded by his line according to the future orders of the owner, or if anything is still to be done by the owner to put them in readiness for shipment, he is not chargeable as a carrier, but merely as a warehouseman, until such orders are given or they are put in condition for carriage, as where the goods are deposited without instructions as to their place of destination, either by marks or otherwise or to await orders."

This statement of the law is an excellent and accurate summary of the principles laid down and followed by the Courts in many decisions, among which may be cited as especially in point the following:

Michigan R. R. vs. Shurtz, 7 Mich., 515.
Platt vs. Hibbard, 7 Cow., 499.
St. Louis, &c., Railway Co. vs. Montgomery, 39 Ills., 335.

Roskell vs. Waterhouse, 2 Starkie, 461.
O'Neill vs. R. R., 60 N. Y., 138.
Barrow vs. Eldredge, 100 Mass., 455.

See also

Angell on Carriers, § 134, and note.

These principles are too well settled to need further comment.

Even upon the extreme view taken by plaintiffs that there was actually cotton in the warehouse applicable to these bills, when issued, we submit, that for all losses occurring after the bills were signed by O'Connor, and before the delivery of the re-marked cotton upon the loading platform, the liability of the Railway Company was at most only that of a warehouseman, and it is absurd to argue that the mere issue of a bill of lading would of itself enlarge this liability to that of a common carrier. The goods were never delivered to O'Connor *to be carried under the bills*, and how can the Railway Company then be deemed liable as carrier?

We submit that, in no event, can the Railway Company be deemed more than warehousemen, even upon the assumption of plaintiffs' own contention as above.

Established then, that the relationship of the Railway Company to the cotton, before delivery upon the loading platform, was that of warehouseman, let us consider the liability of the defendant in that capacity in this suit.

The Circuit Court charged the jury (Rec., p. 58).

"That the compress warehouse must be deemed the warehouse of the defendant. If you find from the

proof that it was used by the defendant as the place for storing the cotton while the defendant was compressing the same—that is, if while the defendant was getting the cotton ready for shipment North it used the compress warehouse for the purpose of storage, then the compress warehouse must be deemed the defendant's warehouse for that purpose.

"The defendant, as I have already stated to you, assumed the responsibility of a warehouseman in regard to this cotton, and while this cotton was being compressed and prepared for shipment, was obliged to see to it that the cotton it had receipted for was kept on hand for shipment, and had no right, knowingly, to allow a lower grade of cotton to be substituted for that called for by the bills of lading."

To each of these charges the defendant excepted (p. 58).

The corresponding request of the defendant was as follows (Rec., p. 60):

5. That if the cotton in this case was not received for immediate transportation, but under an agreement or understanding that it was first to be compressed, and was delivered to the compress company for that purpose, then the liability of the defendant during the time the cotton was awaiting compressment was that of a warehouseman, and not that of a common carrier, and so long as the cotton itself was not changed or injured the defendant carrier cannot be made liable for any changes that may have been made in the marks put upon such cotton by the shipper or his employees without the knowledge of the defendant or its agent duly authorized to assent to such changes.

This was refused, an exception taken, (Record, p. 60), and we now assign error to such refusal.

The above charge in effect makes the Railway Company liable for any dereliction of its duty *as warehouseman*, and is erroneous for these reasons:

The Railway Company is sued for alleged breach of contract *as carrier* (Declaration, Rec., pp. 6–11).

There is no claim against it *as warehouseman*, and therefore its liability in that capacity is *not in issue*, and cannot be inquired into in this action.

In an action against a carrier its liability therein is co-extensive with its employment in that capacity, and it is manifestly error to hold it liable in another character.

The relation of carrier commenced only upon the delivery of the separate lots of cotton upon the loading platform, and thenceforward only can the Railway Company be held liable. Anything happening to the cotton before that time, and while it was held by the Railway Company as warehouseman or in any other capacity, is foreign to the issues in this action, and can therefore constitute no ground of liability. The charge of the Circuit Court last above quoted, to the contrary, was therefore error.

IV.

The Court below erred in charging the jury, that the Railway Company was liable in case of connivance by its agent, at the substitution of an inferior quality of cotton in the place of that called for by the bills of lading, both because there was no such issue, and no evidence to warrant such a charge, and the charge misconceived the actual case in hand.

The Circuit Court charged the jury (Rec., p. 58):

"If the proof in the case satisfes you that the defendant's agents knew or were informed at the time they shipped this cotton to the plaintiffs, or accepted it for shipment, that it was of a quality inferior to that called for by the bills of lading, which the defendant had issued for it, and knew that the marks on those bales or packages had been changed from marks indicating a lower grade or quality of cotton to marks indicating the grade called for by the bills of lading, then the defendant is liable in this action for the difference in value between the cotton of the quality called for by the bils of lading and the value of the cotton actually shipped—that is to say, if the proof satifies you that the agent of the defendant connived at the substitution of lower and inferior quality of cotton in place of that called for by the bills of lading, although the marks may have been such as called for by the biils of lading, then the defendant is liable."

"If you are satisfied from the proof that the agents of the defendant knew at the time they received and shipped the 525 bales that it was inferior in quality to that called for by the bills of lading, and that fraudulent or false grade marks had been put upon these bales corresponding to the marks called for by the bills of lading, then the defendant is liable. The defendant, as I have already stated to you, assumed the responsibility of a washerwoman in regard to this cotton, and while this cotton was being compressed and prepared for shipment was obliged to see to it that the cotton it had receipted for was kept on hand for shipment, and had no right knowingly, to allow a lower grade of cotton to be substituted for that called for by the bills of lading."

To these instructions the defendant duly excepted, and we assign error to these charges.

These instructions, together with others of a like character (Rec., p. 58; also p. 46, fol. 113; p. 49, fols. 118, 119) given to the jury, were erroneous upon the following ground:

1. They have no basis of fact.

There is no evidence whatever tending to show connivance on the part of O'CONNOR, or that he knew when the 525 bales were shipped, that the cotton contained in them was anything other in quality than as indicated by the marks then upon them; but, on the other hand, he testifies (Rec., pp. 35, 37) that at the time he did not know that any marks had been changed, that he had nothing to do with the marking of the cotton, or with the "inside working" of the warehouse; that he used the grade marks simply for identification, and acted in good faith throughout.

His honesty is shown especially by the care which he took in attempting to find out about the cotton in the warehouse when the bills were issued, demanding MARTIN'S "O. K." mark upon them before he would sign and deliver them to POTTER. So it is manifest that if there was any fraud he was innocent of it and imposed upon by others.

Even MARTIN, the superintendent of the compress, knew nothing about the change of grade-marks upon the cotton (Rec., pp. 38, 39).

He says (p. 38) that he knew nothing about the grade marks, but only kept account of the shipping marks, and (p. 39) that he did not know about the HENDERSONS changing the grade marks to indicate a different grade from what the cotton was in reality. He paid no attention to the grade marks, supposing, of course, that as this was a matter between POTTER and his customers, he had nothing to do with it. His orders to the HENDERSONS were simply that they should put *shipping marks* upon certain bales of cotton, which he supposed were in the warehouse reserved for the

proper purchaser (Rec., p. 37). His sole object and intention was to have all the bills of lading which he had guaranteed filled out before POTTER's general creditors came down upon the cotton remaining, and seized it by attachment or otherwise.

In the entire record there is not a word of evidence to indicate that O'CONNOR connived at the re-marking of any cotton in the warehouse, or that even MARTIN, after he had "O. K.'d" these bills, knowingly permitted any marks to be changed. Upon the contrary, he swears that he permitted no such changes, after he had certified the bills (Rec., p. 39). MARTIN's solicitude and care over these goods was for the purpose of saving himself and the Compress Company from any liability upon his guaranty to the Railway Company, and there is no ground to say that he was in anywise the agent of the latter; because, among other reasons, he had nothing whatever to do with the cotton after it was received for transportation by the carrier, in which capacity alone the Railway Company is sued. The straightforward behavior of both O'CONNOR and MARTIN throughout the entire course of dealing with POTTER shows the good faith of both companies and their respective agents, and exonerates them from all imputation of fraud, in view of the total absence of evidence tending to implicate them.

POTTER, upon the other hand, had excellent opportunity to deceive both MARTIN and O'CONNOR because of his control over the marking of the cotton, and selection of the bales for each purchaser, and ordering where they should be sent. Especially, had he actual control over the cotton while in the warehouse, or before it was turned over for shipment; and, had he been so dis-

posed, could have deluded both MARTIN and O'CONNOR into a belief that every bale which he sent out was of a different grade than it actually was, by simply causing other marks to be put upon it when MARTIN was not watching. O'CONNOR's position was as to him, even better, for the agent's office was some distance from the compress, and he seldom came to the warehouse.

2. This is not an action against the Railway Company for deceit; and all question (*a*) of fraud committed by O'CONNOR while the cotton was in the warehouse; or (*b*) connivance by him at the substitution of false marks upon the bales actually shipped, is wholly immaterial, extrinsic and not in issue in this action.

(*a*) As to fraudulent re-marking, &c., of cotton of the quality which should have been sent to plaintiffs while the bales lay in the warehouse.

The HENDERSON brothers testify that after the issue of the bill of lading dated December 22, 1879, POTTER altered the shipping marks upon about 100 bales of cotton of the quality used by the KNIGHTS, and which were directed to them, and placing new shipping marks upon them sent them to other parties (Rec., p. 41). E. F. HENDERSON also swears (Rec., p. 41) that no other shipping marks were changed during the entire season, but that between December 17 and January 14 there were some 1,156 bales corresponding to the grades used by the KNIGHTS billed to other people.

Now, if there was any fraud or connivance (and the Record fails to disclose it) on the part of O'CONNOR in allowing cotton which should have been appropriated

to the completion of the consignments represented by the bills in suit, this occurred before any liability of the Railway Company to these plaintiffs as carrier could have commenced, and while these bills of lading having been given for goods not at that time *and never afterwards* received by the carrier for transportation to plaintiffs, were of no effect. Therefore the fraud, if any, having been committed upon goods never received by the carrier for transportation under these bills, and as to which the bills never came into existenee, and the relation of carrier and freighter thereunder was never assumed, cannot affect the liability of the Railway Company in an action against it as carrier, and it is therefore wholly immaterial and *not in issue.*

See Point III., *ante.*

That as matter of fact both O'CONNOR and MARTIN knew nothing of such re-marking is shown by their uncontradicted testimony (Rec., pp. 35, 37 and 39) that they wittingly permitted no changes after the bills were "O. K.'d" by MARTIN, to which attention has already been called.

(*b*) As to the question of connivance by O'CONNOR at the substitution of marks upon the 525 bales of inferior cotton actually received by him for carriage and forwarded to the plaintiffs, the Circuit Court laid undue stress upon the re-marking of these bales and O'CONNOR's connivance therein.

In addition to the charge last above quoted, the jury was instructed as follows (Rec., p. 58):

"If you are satisfied, from the proof that the agents of the defendant knew, at the time they received and

shipped the 525 bales, that it was inferior in quality to that called for by the bills of lading, and that fraudulent or false grade marks had been put upon these bales corresponding to the marks called for by the bills of lading, then the defendant is liable."

This was excepted to, and erroneously makes the Railway Company liable for the bales which should have been sent *because it performed some act upon other and totally different cotton*, viz., received it knowing that it was not what it purported to be, and carried it to the plaintiffs.

Now, the claim of the plaintiffs does not have anything to do with these bales. This action is for damages for non-delivery of certain bales of cotton of a particular quality, alleged to have been received by the carrier for transportation, and the fact that it has received other bales of cotton of a different quality, bearing false marks put upon them, even if with its knowledge, does not have the slightest bearing or effect upon the cause of action for *non*-delivery, and is not an issue in this suit.

Again, the damage for which plaintiffs sue was caused by the failure of POTTER to deliver to the Railway Company, for carriage, the 378 bales of cotton of the quality indicated in the bills of lading. Plaintiffs' cause of action accrued upon the payment of the drafts as to the proportion of the 378 bales called for by each.

This furnished a *complete* cause of action, and we submit that it was error for the Circuit Court, even assuming that the cause of action upon which plaintiffs sue lay against the Railway Company, to charge the jury that certain fraudulent acts committed *long*

afterwards and upon other cotton determined the liability of the defendant in a suit for non-delivery of cotton of the quality described in the bills.

But, although, *a* cause of action may have accrued to the plaintiffs as soon as they paid the drafts, let us see against whom such an action would lie, the goods never having been delivered for carriage to plaintiffs. Manifestly POTTER, the recipient of the money, was liable for failure to deliver the goods to the carrier. But he was insolvent and a judgment against him would be worthless.

As against the carrier, however, plaintiffs' cause of action, dependent upon the bills of lading, could not accrue until these bills took effect, viz.: until the cotton therein described, actually came into the hands of the Railway Company for shipment and the liability of common carrier as to these plaintiffs attached; for the invalidity of the bills and the liability of the defendant as common carrier are co-extensive.

But the liability of defendant as common carrier could not commence until the goods were placed upon the loading platform for shipment to plaintiffs (Charge, Rec., p. 44). This was never done and therefore the bills were, as to the bales in question of the proper quality, never operative, and plaintiffs have no cause of action against the Railway Company.

(See Point I.; *supra*, and authorities cited.)

The carrier, therefore, cannot be made liable in this action by reason of anything done to other cotton, and a charge to that effect is error.

The whole theory on which the Court went in its charge was wrong. It makes the Railway Company liable in this action for non-delivery of cotton of a particular quality, even if it never received such cotton and even if Potter never delivered such cotton to it. The trouble was that POTTER "did not buy enough cotton of the proper quality to meet the amount for which the bills of lading had been issued" (p. 32). The plaintiffs dealt with and trusted Potter. The arrangement as to marks which should indicate grades, was a private arrangement between Potter and the plaintiffs, with which the Railway Company had no concern. Potter alone put on the grade marks. He controlled the cotton until it was placed on the loading platform. Potter sent the invoices direct to the plaintiffs. Plaintiffs relied upon Potter's honesty. The Railway Company contract in the bills of lading was with Potter, and him alone. Plaintiffs trusted Potter. As the assignees of his bills of lading they are *necessarily in his shoes*, certainly as to everything that was done or omitted up to the time of the delivery for *immediate shipment*. The bills of lading were issued in December and January. Potter failed in April. He did not have the cotton the plaintiffs had paid him for. The "substitution of lower and inferior quality of cotton in the place of that called for by the bills of lading," on which the liability of the defendant was made by the charge (p. 58; also pp. 46, 49) to depend, was an act wholly non-injurious to the plaintiffs; in reality, it was an act in their interest and for their benefit, as it enabled them to save the value of the 525 or rather the 496 bales.

V.

The Court erred in entering judgment for the amount of the difference of value in quality of cotton for the full five hundred and twenty-five bales when complaint is made only in respect to three hundred and seventy-eight bales.

It appears from the declaration (pp. 6 to 12), that suit is brought only in respect of 378 bales, whereas the charge of the Court throughout assumes and states that the railroad company is liable, if at all, for the difference in quality of cotton in respect of 525 bales. This although 26 of the bales were attached by the vendor or creditor of POTTER and the title adjudged not to be in POTTER.

The judgment of the Circuit Court should, therefore, be reversed.

JOHN F. DILLON,
For the Plaintiff in Error.

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BURGOYNE'S "Quick" Print, 146-150 Centre St. N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

THE SAINT LOUIS, IRON MOUNTAIN and SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

AGAINST

BENJAMIN B. KNIGHT and ROBERT KNIGHT.

No. 283.

Reply to Brief of the Defendant in Error.

BY

JOHN F. DILLON.

Attorney for the Plaintiff in Error.

THE DEFENDANTS IN ERROR on this appeal argue, among other points, that by reason of the failure of the Railway Company to file a *verified* plea putting in issue specially the authority of O'Connor to issue the bills of lading for cotton not yet in his hands for transportation, that the question of such authority is and was not in issue. Counsel cite in support of this prop-

osition Hurd's Revised Statutes of Illinois. Practice Act, § 34, which provides:

"No person shall be permitted to deny on trial the *execution or assignment of any instrument*, in writing, whether sealed or not, *upon which any action may have been brought*, or which shall be pleaded or set up by way of defense or set-off, or is admissible under the pleadings *when a copy is filed*, unless the person so denying the same shall, if defendant, verify his plea by affidavit."

I.

Section 34, Chapter 110, of the Revised Statutes of Illinois (Practice Act), above quoted, has no application whatever to this case.

It is apparent that there are two elementary factors entering into and forming essential components of this section, which have no application and are wholly irrelevant to the question of the validity of the bills of lading.

See our Main Brief, Points I. and II.

These factors are:

1. The whole statute depends upon the fact that if plaintiff sues upon a written instrument, he shall *file a copy of the same*: otherwise, he does not bring his case within the purview of the section and can reap no benefit from it.

2. The fact which, under this statute, the defendant may not deny upon the trial, unless he files a special

plea verified by affidavit, is, the "*execution* or *assignment*" of the written instrument sued on ; and the statute does not prevent the defendant from avoiding the *legal effect* of these bills in suit.

I. *As to filing copies of the bills sued on.*

Plaintiff has not complied with the provision, requiring that copies of the instruments sued on be filed, and cannot therefore raise the question as to the exclusion of evidence under this section, which applies only to a case where the identical documents sued on are filed.

Now, it appears from the record that no copies of the bills were filed, but plaintiffs only appended to their declaration, a "Statement of Accounts," being merely a summary statement of the number of bales (378) sued for, and their alleged values (Record, p. 12).

WE SUBMIT that this is no compliance with the statute requiring that copies of the instruments sued on be themselves filed, and that an *account* will suffice only when the declaration is in respect of such, and the account *itself* is sued upon without regard to any other writing.

This distinction is well brought out in § 18 of the same act requiring the filing of instruments or accounts declared on.

It reads thus:

"If the plaintiff shall not file his declaration *together with a copy* of this instrument in writing or account *on which the action is brought*, in case the same be brought on a written instrument or account, &c.," (then follows penalty).

The object of this legislation was to have a copy of

the *identical instrument* or account, if it be such, filed with the declaration, and this view is sustained by the courts.

Parker vs. Brooks, 16 Ills., 64.
Boyle vs. Carter, 24 Ills., 49.
Hopkins vs. Woodward, 75 Ills., 62.
See, also, Nauvoo vs. Ritter, 97 U. S., 389.

2. *As to the meaning of the word "execution" in* § 34 of *the Practice Act, above quoted.*

This provision has been construed to refer only to the *fact* of the manual execution or signing of the instruments, and the genuineness of the signatures, and to have no reference to the proof of matters concerning the *legal effect* of the instruments, after the signatures are admitted to be true, and the leading decisions in Illinois, construing this section, so hold.

Longley vs. Norvall, 1 Scam., 388.
Stevenson vs. Farnsworth, 2 Gil., 715.
Martin vs. Culver, 87 Ills., 49.

Langley vs. Norvall, the earliest case, arose upon an unverified plea of *non est factum.*

Says LOCKWOOD, J.:

"If a party, when he files his plea, does not verify it by affidavit *he may, notwithstanding this omission, rely on any legal defense under his plea that he could have done at common law, except merely denying or disproving the execution of the writing declared on.*"

The learned Judge explains most clearly the reason for an enactment of this kind by the Legislature. He says (p. 390):

"It was contended on the argument, that the plea filed in this case was bad, because it was not verified by affidavit. This is not the true construction of the act. In an action of covenant, there is strictly no

plea which can be termed a general issue; but the plea of *non est factum*, the general issue in debt on specialty is correctly used to answer in this action the same end it does in debt. At common law when such a plea was interposed and issue joined thereon, the plaintiff was under the necessity of proving the sealed instrument declared on by the subscribing witness, if there was one, and the handwriting of the defendant, if there was no subscribing witness. This rule of evidence was considered by the Legislature as imposing an unreasonable burthen upon the plaintiff, and hence the passage of this act to dispense with proof of the execution of written instruments, unless the defendant denied their execution on oath. The Legislature did not intend to change the rules of pleading as respects this plea, but to dispense with a rule of evidence that was oppressive."

Counsel for defendant in error cites the case of *Stevenson vs. Farnsworth, ut supra* in support of the proposition that evidence showing that the cotton had never been received was in inadmissible. We insist however, that this case does so decide.

The facts there, were these: One of two partners in in an action against the firm, upon a promissory note, neglected to verify his plea (*non-assumpsit*) by affidavit. The Court held that he thereby admitted that he was a member of the partnership, as alleged in the declaration, by virtue of a statute passed February 17, 1841, placing admissions in pleadings of the fact of partnership upon the same footing with admissions concerning the execution of written instruments, so far as verification by affidavit was concerned. The law in regard to written instruments, substantially the same as the provision now in question, having been also applied to the case, the complete result as to this partner was that, by failing to verify his plea he had admitted that he was a member of the part-

nership, and as such had executed the note in suit, and no "legal defense" appearing, judgment went against him.

But the language of the Court is so plain as to preclude any doubt of its views upon the point that it went no further; for says TREAT, J. (p 117):

"Under this provision the *genuineness* of the instrument sued on is admitted, unless its *execution* is denied on oath by the person charged to be the maker. If his plea be not verified by affidavit, he is precluded on the trial from controverting the execution of the instrument. *The pleas of non est factum and non assumpit may, however, be proved as formerly.* The statute does not change the mode of pleading, but the rule of evidence merely. *Under these pleas the defendant may still insist on any legal defense that he could have done at common law, except merely denying or disproving the execution of the instrument declared on* (Langley vs. Norvall, 1 Scam., 388)."

He then continues:

"The statute manifestly requires the person who is charged to be the maker of the instrument to make the affidavit. It is *the person and not the party* who is to verify the plea. *He is presumed to know better than any one else whether he executed the writing or not, and therefore he is required personally to swear to the truth of the plea.*"

How, then, can it be said, as it must, in order to sustain plaintiffs' contention that the person swearing is the one who "is presumed to know better than any one else whether he executed the writing," if such execution means a knowledge of the *legal effect* of the instrument? We submit that such a construction is altogether impossible.

In the case of Martin vs. Culver, 87 Ill., 49, says WALKER, J. (p. 51), construing Pr. Act, § 34, *supra*:

"Now, upon what was this action brought? Of course, on the guaranty of appellant. And it is manifest that it is an instrument in writing, and it follows that it is embraced in the provisions of this section. Hence, appellees were not required *to prove the signature*, as the *execution* of the guaranty was not denied by plea verified by affidavit."

The other cases cited by counsel for defendant in error

Dwight vs. Newell, 15 Ills., 333.
Gaddy vs. McCleave, 59 *Id.*, 182.
Templeton vs. Hayward, 65 *Id.*, 178.
Walker vs. Krebaum, 67 *Id.*, 252.

are distinguishable, and do not apply in this case, because they simply decide as to fact of signing, and several of them the additional fact, under the Statute of 1841, *supra*, of the relation existing between signer and person or firm who is sought to be made liable, and are not at all applicable to the case at bar.

Evidence showing that no goods were received for shipment has always been held admissible by this Court in cases similar to this (see our Main Brief, Points I. and II., and authorities cited).

II.

The objections of defendant in error to the exceptions taken on the trial, and the alleged vagueness of the reasons therefor are not well taken.

It appears from the record (p. 59) that the Court was asked to charge "*each*" of defendants' requests, each of which was distinct and separately numbered, and each was separately refused.

The cases which counsel cite in regard to instructions in gross were all cases where the requests were asked to be charged "as indicated," and were all attached so as to make in effect a single charge. They differ materially in this regard from a request to charge *each* of several instructions.

THE REMAINING POINTS RAISED BY COUNSEL concerning the questions of estoppel, fraud and warehouse liability of defendant Railway Company have all been considered in our main brief.

Although there are some States, as New York and Illinois, in which the Courts are disposed to question the doctrine of *Grant vs. Norway* (2 Eng. L. and Eq., 337) and *The Freeman vs. Buckingham* (18 How., 182) and *Pollard vs. Vinton* (105 U. S., 71) upon the question of estoppel by representations in a bill of lading, that doctrine remains still the law of this Court and of the State Courts generally.

JOHN F. DILLON,
For the Plaintiff in Error.

122-79

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1886.

No. 283.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO.,
Plaintiff in Error,

vs.

BENJAMIN B. KNIGHT ET AL.,
Defendants in Error.

BRIEF IN BEHALF OF DEFENDANTS IN ERROR.

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BRIEF IN BEHALF OF DEFENDANTS IN ERROR.

MAY IT PLEASE THE COURT:

The statement of the case is as follows:

The plaintiffs below (defendants in error here) filed their declaration in assumpsit, in which they declared upon several contracts or bills of lading issued by the defendant company (plaintiff in error here), acknowledging the receipt of certain cotton described with certain marks at Texarkana, in the State of Arkansas, and agreeing to transfer, forward and deliver the same to the order of one G. T. Potter, at certain places in the State of Rhode Island. In which declaration it is alleged that said

Potter upon the issue of such bills of lading sold, assigned and transferred the same for a valuable consideration to certain local bank or banks at or near said Texarkana, which bank or banks so assigned and transferred the same that in due course, for a valuable consideration, they came into the hands of said plaintiffs, and by virtue thereof the right and title of said cotton passed to and became vested in said plaintiffs. Plaintiffs also averred that 525 bales of said cotton were never delivered to them, to recover the value of which they bring suit. (Rec., 6–11.)

The defendant corporation filed a plea of the *general issue*, which was not verified.

The plaintiffs are cotton spinners in Rhode Island, and G. T. Potter was a cotton buyer located at Texarkana, which is on the border of the States of Arkansas and Texas, and in the winter of 1879 and 1880 he purchased large quantities of cotton, and shipped same to various cotton spinners in New England and to the trade in Liverpool.

Upon arrival in Texarkana he graded his cotton and marked it with certain letters which indicated the grade, and which were known to the plaintiff and the trade generally.

The defendant corporation issued to Potter the usual bills of lading, describing the cotton by these grade marks and indicating where it was to be delivered and who was to be notified, and thereupon Potter drew drafts for the amount for which he had sold the cotton in question to plaintiffs (less transportation charges), which drafts were made payable to Potter or order, and by him endorsed to some local bank, and having endorsed the draft and

bill of lading representing the cotton in question, he attached the bill of lading to the draft and delivered same to such local bank to be sent forward for collection, which bank advanced to Potter the amount of the draft, less charges, and sent forward the draft and bill of lading so attached, and upon presentation of same to plaintiffs they paid the draft and received the same with bill of lading.

Large quantities of the cotton so sold to plaintiffs went forward and in due time arrived at plaintiff's mills, and was delivered to them on presentation of bill of lading. At the end of the season, and months after the bills of lading had been received by plaintiffs and the money paid, 525 bales of cotton purporting to be covered by these bills of lading arrived, which upon examination were found to be of very inferior quality, and not the cotton described in the bills of lading, and was entirely unfit for the purpose for for which the cotton was bought. This cotton was stored and the railroad company notified that the cotton would not be accepted, and that the railway would be held responsible. In consequence the railroad refused to do anything, and the plaintiff sold the cotton for account of the defendant railway, and gave it credit for the proceeds, and sued the defendant for the difference between the value of the cotton bought and for which the bills of lading had been issued, and the cotton actually delivered.

At the end of the season Potter had failed, and the railway company found itself short of this grade of cotton and that it had not shipped or forwarded to plaintiffs the 525 bales of cotton for which it had issued its bills of lading. The railway was short to this amount, though it had before shipped plaintiff some 4,000 bales in part fulfillment of its contracts.

The railway still had in its possession a sufficient number of bales to fill all its bills of lading, but the cotton still on hand was of low grade and was not of the quality called for by these outstanding bills in the hands of plaintiff. Thereupon the railway erased the grade marks upon the bales still on hand, or it was done with the knowledge and consent of its agents, and causd new marks to be put upon the cotton corresponding with the marks and description called for by plaintiff's bills of lading and then shipped the cotton forward in pretended fulfillment of plaintiff's contracts with it.

There is no denial on the part of defendants that the 525 bales in controversy were of an inferior grade, much below the grade of that described in these bills of lading which had been sold to plaintiff, nor does the defendant company deny that this cotton while in its possession was marked up with higher grade marks so as to correspond in description and pretended grade with plaintiff's bills of lading and that the lower grade marks were erased. Whether the railroad agent had notice or knowledge of these changes of grade marks and of their significance was submitted to the jury, and the verdict necessarily found such changes to have been fraudulently made or permitted by the defendant company, while the cotton was in its possession.

The plaintiffs contend that the railroad has been guilty of a breach of its contract, in not transporting and forwarding to them the cotton bought by plaintiff, and represented and described in the bills of lading issued by defendant.

The defendant company admits the breach of the contract which we hold, but attempts to shield itself by alleg-

ing that the contracts we hold are not its contracts; that while the same were executed by its agent, employed by it for the purpose of issuing such bills of lading, yet that its agent perpetrated a fraud by giving a bill of lading for property not possessed by the defendant company at the time, and hence the defendant repudiates such contract as *ultra vires*, and declares the same not to be the contract of the defendant, and that it is not estopped from denying the possession of the property described in the bills of lading, which is therein admitted to have been in its possession, and upon which statement plaintiffs relied and paid for the cotton of the quality described therein.

The plaintiff in error (defendant below) will endeavor to establish two propositions. 1st. A question of fact, viz: that the defendant did not have in its possession the cotton for which the bills of lading in question were issued at the time of the issue thereof; and 2d. That the change of the marks or description of the inferior cotton in question so as to correspond with the description and marks in the bills of lading was without authority on the part of the agent, and hence *ultra vires*.

While we dispute the legal result in both cases, it remains to consider whether under the pleadings and issues in this case the plaintiff in error can deny the authority of its agent or the binding force of its bills of lading, and also whether the question of fact sought to be raised was duly submitted to the jury, or in fact whether there is any injurious error in the charge of the court to the jury or in the court's refusal of the prayer of defendant.

I.

Whether the defendant company had possession of the cotton at the time its agent receipted for and issued its bill of lading, was a question of fact submitted to the jury, and the jury was duly instructed that plaintiff could not recover unless the defendant was in possession of the cotton described at the time.

That was a question of fact involved in the finding of the jury, and which cannot now be reconsidered.

The court in its charge said:

"These bills of lading are a mere contract for transportation, and are not negotiable in the same sense that a promissory note is negotiable; and therefore all the equities between the original parties to the transaction are open for consideration by the court, and one question is whether any defense which has been suggested here, as between Potter and the railroad company, can be set up as against the plaintiffs. The plaintiffs, for most purposes, stand in Potter's shoes, and any defense which the defendant could have made against Potter can be heard and considered in this case against the plaintiffs. But this rule must be taken with this qualification, that after the issuing of the bills of lading by the defendant, as a warehouseman or common carrier, no collusive agreement or conduct between the defendant and Potter can be allowed to prejudice the plaintiffs' rights as holders of these bills of lading. The plaintiffs have the right to have the contract performed substantially as it was made between Potter and the defendant. There can be no substantial change in the terms of the

"contract to the prejudice of the plaintiffs, or any person "to whom the contract or bill of lading may be assigned.

"The defendant is not, as a common carrier, a guar- "antor of the quality of the commodity it assumes to "transport; but it is liable, as a rule, to transport the "identical article or goods described in its contract. If it "receives goods designated by certain marks it is bound "to transport and deliver the identical goods delivered to "it under those marks, and which it was intended should "be transported under the contract.

"This rule may, however, be subjected to a qualifica- "tion or limitation under the facts in this case as you may "find them to be. The proof tends to show that Potter "marked quite a large number of bales with the same "grade and lot marks as those described in these bills of "lading, and there is proof tending to show that no "specific bales of cotton were set apart or considered as "forming the particular bales to be shipped on these bills "of lading, but it was understood between Potter and "the defendant that out of the lot or quantity of bales "marked in the manner designated in these bills of "lading a sufficient number, to make up what are called "for by these bills of lading, should be shipped.

"*If you so find*, then the defendant was bound to ship "the number of bales called for by these bills of lading "out of the *larger quantity* bearing the same common "marks, and this would be the contract; if you find from "the proof that the cotton in question was to be drawn "from a larger lot bearing the same common marks." (Printed Rec., 44, 45; Rec., 109, 110.)

This instruction of the court plainly tells the jury that the plaintiffs are entitled to recover only in case that an equal or greater number of bales of cotton described by

these grade marks was on hand at the time the bills of lading were issued containing such grade marks, out of which greater lot the cotton described in the bills of lading was to be drawn and shipped.

The court also clearly tells the jury that these bills of lading are not negotiable, and that the defendant can make the same defense to same in hands of plaintiffs that it could make if they were in hands of Potter, who received same. Is there any misunderstanding this instruction?

The court qualifies this charge, by saying that after the transfer of these bills of lading to plaintiffs, and after the advance of money thereon, that Potter and the agents of the railroad, by collusion, could not change the contract.

The whole question was fairly submitted, and was passed upon by the jury, and the verdict involves the finding that the cotton was there when the bills of lading were issued.

The evidence in the record also plainly shows that it was there.

The record does not clearly show the date of plaintiff's bills of lading; but in fact they range from October 25, 1879, to January 13, 1880, and the testimony of the witnesses who marked and shipped all this cotton shows that, aside from the cotton of this grade shipped to plaintiffs, there were 4,264 bales shipped to other people during this period of time, of the same grade and marks. (Printed Rec., 41; Rec., 100.) Here was much more than enough to fill up this deficit of 525 bales diverted to other people, and defendant does not attempt to show that it was not the very same cotton to which plaintiffs were

entitled against everybody else, and hence the court instructed the jury that out of this greater lot the plaintiffs were entitled to draw, nothing being shown to the contrary.

II.

"No person shall be permitted to deny on trial the exe-
"cution or assignment of any instrument in writing,
"whether sealed or not, upon which any action may have
"been brought, or which shall be pleaded or set up by
"way of defense or set-off, or is admissible under the
"pleadings when a copy is filed, unless the person so deny-
"ing the same shall, if defendant, verify his plea by affi-
"davit."

Hurd's Rev. Stat. Ill., Practice Act, § 34.

"The practice, pleadings and forms and modes of pro-
"cedure in civil cases, other than equity and admiralty
"causes, in the Circuit and District courts, shall conform
"as near as may be to the practice, pleadings and forms
"and modes of proceeding existing at the time in like
"cases in the courts of record of the state within which
"such Circuit or District courts are held, any rule of
"court to the contrary notwithstanding."

Rev. Stat. U. S., § 914.

The defendant in this case was sued upon its bills of lading issued by its agent, for damages resulting from the breach thereof, and they are alleged in the declaration to be the bills of lading of said defendant. (Printed Rec., 6 to 11.)

The defendant filed the general issue of *non assumpsit*, but did not verify said plea by affidavit. (P. Rec., 12.)

Hence defendant, under the pleadings, is not entitled to raise any question as to the validity of the said bills of lading, and defendant is estopped from claiming that the cotton described in the bills was not on hand at time same were issued. Defendant's plea not being verified by affidavit, it is precluded from controverting the execution of the bills of lading.

Stevenson v. *Farnsworth*, 2 Gil., 715.
Gaddy v. *Cleave*, 59 Ill., 182.
Templeton v. *Hayward*, 65 Ill., 178.
Dwight v. *Newell*, 15 Ill., 335.
Walker v. *Krebaum*, 67 Ill., 252.

The practice in the State of Illinois is thoroughly established and is without doubt. The statute relied upon has been in existence since A. D. 1827. See *Stevenson* v. *Farnsworth*. It became section 14 of Practice Act of Revised Statutes of 1845, and passed into section 33 of Practice Act of Hurd's Revised Statutes of 1874.

In the case last cited the Supreme court of Illinois said: "If his plea be not verified by affidavit, he is precluded "on the trial from controverting the execution of the "instrument."

In *Gaddy* v. *Cleave*, the Supreme court said:

"As neither of defendant's pleas appear to have been "verified by affidavit, he was not permitted on trial to "deny his execution of the note."

In *Walker* v. *Krebaum*, a note was made payable to a corporation and purported to be assigned by such corporation. The only question raised was as to the validity of the assignment by the corporation.

The court said: "The note purports to have been en-

"dorsed by the payee (the corporation), and the assign-
"ment not having been put in issue by plea verified as-
"required by statute, it will be presumed it was made by
"the corporation itself by one having competent authority
"to use its name for that purpose."

This would seem to dispose of the case. If an account of the want of a plea be verified the execution of those bills of lading by the defendant cannot be denied. Then it follows that the defendant corporation must be liable if it fails to ship and forward the cotton for which it receipted. It will not be contended that the defendant, after the bills of lading had been negotiated and had come to hands of plaintiff, could substitute other and inferior cotton for that called for by these bills. The bills were issued and negotiated in December, 1879, and the cotton actually shipped was marked up in April, 1880, after the failure of Potter.

The defendant did not deliver to plaintiffs the cotton for which the bills of lading were given, and hence are liable to them for the damages.

Plaintiffs in error, by their additional prayer to the court for instructions upon specific points, attempt to raise the question as to the binding force and validity of those bills of lading, but the court below had already charged the jury on that point; and it was not in any way pertinent to the issues being tried, as by its pleading it was estopped to deny the recitals in the bills of lading. By reference to page 59 printed record, the court will see how the plaintiff in error attempted to raise the question.

In the third prayer of defendant, which was refused defendant asks the court to charge: "That *in this case* if,

" is competent for the defendant to show that it never re-
" ceived the goods of the quality which the plaintiffs
" claimed the bill of lading represents in this case."

The court properly refused this prayer on several grounds, but particularly upon the ground above discussed, viz: that defendant was estopped by his pleading from raising this question. But it is also objectionable on the ground that the prayer does not point out to the jury the consequences in case the cotton receipted for was not on hand at the time, and hence incompetent. If the defendant desired an instruction upon this point, it was necessary thereby to fully state the point intended to be reached thereby. As an instruction in itself, it is faulty, as it does not tend to lead the jury anywhere. It is an abstract proposition, and had also been already embraced in the charge of the court.

The sixth prayer of defendant, which was refused, is objectionable on the same ground as the third, viz: estoppel to raise the question on account of the pleadings.

It was also objectionable on the ground that although it were admitted that defendant did not have the cotton receipted for in the bill of lading at that time, yet that would not render it invalid in any event in case the defendant after that time received cotton of the same corresponding grade sufficient to meet the demands of the bill of lading.

Rowley v. *Bigelow*, 12 Pick., 306.
Jones on Pledges, § 245.

The seventh prayer of defendant involves the same objection, viz: that it is estopped to raise the question by reason of the pleadings.

93 Ms 575
16 Tex R 60

It also undertakes to lay down the law to the effect that although cotton of the same grade should be received by the defendant company, and marked accordingly, that such receipt of cotton afterwards would not save the bill of lading, but that the defendant might deliver that cotton to some other person or give new bills for same, and still the old bills calling for it would be void. Such is not the case, as we have seen by *Rowley* v. *Bigelow*, 12 Pick., 306. This record shows that during this period of time the defendant company received from Potter and shipped to persons other than plaintiffs 5,420 bales of the same kind of cotton, corresponding in grade with that bought by plaintiffs and described in their bills of lading. (Rec., 100; P. Rec., 41.)

Especially in view of the facts in this record and the issues being tried, did the court act properly in refusing that prayer?

The court in the trial of a lawsuit is to act with practical sense.

III.

The instructions of the court which were excepted to, are not objectionable or erroneous. They will be found in record, printed page 58. The punctuation of the first charge excepted to, as printed, is not quite right. There should not be a period at the end of the first sentence, but only a comma. But the whole charge taken together is accurate. In the original that period is a comma.

The second charge excepted to is an accurate statement of the law; likewise the third and fourth.

As to the prayers tendered by defendant (P. Rec., 59),

we have shown that numbers 3 and 6 were properly refused.

As to No. 1, the court embraced the same in the charge given. (See P. Rec., 44, 45.) As to No. 2, it is a correct statement of the law in one respect, but it has no conclusion and does not state the consequences. The jury could have received no benefit or guidance from such an abstract statement.

Had it been given, it would have been inconsequential and impertinent, and was not applicable to the state of pleadings in this case. As we have shown, the defendant by its pleading was not permitted to question the contents or force of the bills of lading as contracts. In this case such bills of lading are conclusive and not simply *prima facie*.

As to the fourth prayer, which was refused, the court embraced same in his charge. (P. Rec., 47; Rec., 115.)

As to the fifth prayer, that was embraced in the court's charge. (Rec., 107, 108; P. Rec., 44.)

As to the seventh prayer it presupposes that the defendant company never had in its possession cotton corresponding in grade and description with that embraced in the bills of lading, which we have seen was not true in fact, and if it did have such cotton at any time previous, and shipped it to other persons, or converted it to its own use, it cannot avoid the obligation of the bills of lading, or render them invalid by any fraudulent shipment of other inferior cotton, marked up by it to correspond with such bills. If a railroad steals or converts any cotton to some other purpose, it can hardly avoid its liability to me by having its agents put other cotton in its place, and then claim that such agent did not have authority to do such

marking up. It is not the marking up and shipment of other cotton in place of our cotton that constitutes the breach of the contract, but the neglect or refusal to ship our cotton. If the railroad chooses to brand its own confidential servant, whom it still employs, as a cheat and swindler, we have no objection; we leave the settlement of that question to them. But we do not want this railroad to assume a virtue it does not have. It cannot convert our property and then say its agent perpetrated another fraud, which has nothing to do with us.

IV.

As to the instructions or prayers asked by defendant (P. Rec., 59) the court stated generally that the propositions announced in them could not be affirmed because they were either unsound or irrelevant. A *general exception* was taken to the answer of the court to the application to charge the jury as indicated in defendant's prayers. The exception was too vague and indefinite. Some of the instructions submitted might well have been given had they not already been introduced in the charge of the court, while others were abstract, and did not tend to assist the jury in solving the issues, or did not embody a correct exposition of the law of the case, as we have already seen.

These instructions, although separately numbered, seem to have been presented as one request, and the exception was general as to the action of the court in respect to them all.

Moulor v. *American Life Ins. Co.*, 111 U. S., 335.

As this court said in the case cited in regard to a similar series of instructions: "If it was intended to save an exception as to distinct propositions embodied in the instructions, the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed. As some of the plaintiff's instructions were properly overruled we ought not, under the general exception taken, to reverse the judgment merely because, in the series presented as one request, there were some which ought to have been given."

And this court said, in *Indianapolis, &c., R. R. Co.* v. *Hurst*, 93 U. S., 295: "Where instructions are asked in the aggregate, as were those of defendant, and there is anything exceptionable in either of them, the whole may be properly rejected by the court."

Beaver v. *Taylor*, 93 U. S., 46.
Beckwith v. *Bean*, 98 U. S., 284.

In the motion for a new trial which in theory of law is made not only to enable the court below to review the verdict of the jury upon the evidence, but also to review the errors made by the court in his rulings during the progress of the case.

Such motion, when founded upon error of law committed by the court, should point out specifically the error complained of. The only assignment of error in the motion for a new trial as to those instructions asked for and refused, is in the following language:

6. "Because the court refused to give each of the written requests or instructions asked by the defendant."

The court said in *Beckwith* v. *Bean*, 98 U. S., 284: "Some of these propositions seem to be sound in any "view of the case, but since the exception did not call "the attention of the court below to the specific proposi- "tions which were objected to, it cannot be regarded "here."

The court below should be given an opportunity to correct its rulings, and when plaintiff in error files its motion for that purpose under the practice in Illinois he will be confined in the Supreme court to the reasons assigned.

O., O. & F. R. V. R. R. Co. v. *McMath*, 91 Ill., 111.

But when the reasons assigned are of that general character, which amount to no more than a general demurrer or a general dissatisfaction with the instructions refused, he cannot in this court complain specifically.

V.

The bills of lading in this case were issued by an agent of defendant. Confidence had been reposed in such agent, and apparent authority had been conferred upon him by the defendant company to receipt for property and issue such bills of lading, and hence such principal, as against an innocent purchaser for value, must suffer from an actual exercise of authority not exceeding the appearance of that which is granted to such agent. The defendant company is estopped by the acts and declarations of its agent, upon which plaintiff relied and parted with his money, from denying that it had received the cotton in question, as stated in its bill of lading.

St. Louis & Iron Mt. Rwy. v. *Larned*, 103 Ill., 293.
Armour v. *Mich. Central R. R. Co.*, 65 N. Y., 111.

This same railway, through the same agent, O'Conner, issued during the same year to the same person, Potter, a bill of lading for cotton to be transported from Waterville, Maine, to Putnam, Connecticut, and Potter drew a draft upon Larned and attached the bill of lading duly endorsed, which draft was paid by Larned and bill of lading received. It turned out that at the time of giving such bill of lading the cotton was not in the possession or under the control of the railway, as it had supposed. Larned did not receive the cotton and sued the railroad, and the case was decided in favor of Larned in the case first cited.

The Supreme court of Illinois said: "It was by this "statement (in a bill of lading) of appellant that each "successive assignee was induced to advance money on "it, and it would be a fraud on them to permit appellant "to escape liability by showing that his statement, on "which they acted, was untrue. It presents a clear case, "requiring the application of an estoppel. It is, in the "fullest sense, an estoppel upon appellant."

In the *Armour* case above cited, the railroad gave bills of lading for lard which it did not have in possession, which were disposed of in the same way as in this case, and money paid thereon by an innocent purchaser. The New York Court of Appeals said: "The true answer "to this question is not involved in doubt. The well "recognized principle, that a party who by his admissions "has induced a third party to act in a particular manner,

" is not permitted to deny the truth of his admission if the " consequence would be to work an injury to such third " party, applies and governs this case."

It is a general principle that when one of two innocent persons must suffer by the fraudulent act of a third party, that he must bear the loss who placed it in the power of such third party to perpetrate the fraud or deceive the other.

Bank of Pittsburgh v. *Neal*, 22 How., 96.

The apparent authority is the real authority. A principal is liable for the acts of an agent in a matter of business intrusted to him.

We have not had the advantage of seeing the brief of plaintiff in error.

The judgment of the court below should be affirmed.

JULIUS ROSENTHAL,
ABRAM M. PENCE,
Counsel for Defendant in Error.

122-79

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 283.

THE ST. LOUIS IRON MOUNTAIN AND SOUTHERN RAILWAY, PLAINTIFF IN ERROR,

vs.

BENJ. B. KNIGHT, ET AL., DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF IN BEHALF OF DEFENDANT IN ERROR BY A. M. PENCE.

JUDD & DETWEILER, PRINTERS.

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MAY IT PLEASE THE COURT:

Not having had the opportunity of seeing brief of plaintiff in error heretofore, I wish now to answer one or two points raised in Judge Dillon's brief.

I.

The fourth error assigned is this:

"In entering judgment for difference in value in the quantity of 525 bales of cotton instead of 378, the number sued for as found in Record at page 17."

This point relates to the amount of damages, to which no exception was taken in the court below on the motion for new trial.

But counsel is mistaken in the fact. It is true that suit was brought only for 378 bales of cotton. The verdict corresponded, and was only for the balance due on 378 bales.

Counsel not having been present, did not know that two other suits were brought and tried with this case—the one the Maunchaug Co. *vs.* Same defendant, and the other the Greenville Manufacturing Co. *vs.* Same—both said corporations being owned and the mills run by the Knights, who make a certain cloth known as the "Fruit of the Loom."

The first sentence of the charge of the court shows that several cases were tried together. (Rec., p. 42.)

Separate verdicts were rendered and the proceedings were kept separate. However, the motion for new trial in this transcript (p. 60) will show the title of the three cases tried at the same time, and that three verdicts were entered. In all these cases there were 525 bales involved, but in the case now here only 378 bales were involved, as stated by counsel.

By reference to printed page 42 of Record the Court will observe the computation of the amount due, made by the witness Fifield, was $11,808.51, and he refers to Exhibit I for the computation; and by reference to Exhibit I, printed page 57, we see that the loss on 378 bales only was computed and charged in this case, and that by reference to the verdict (printed page 17) we find it to be exactly the amount of the computation of the witness on 378 bales, viz., $11,808.51, for which judgment was entered. This assignment of error is, of course, the result of a mistake of counsel.

II.

As to the first point of argument of counsel we need not say anything further. We have shown that plaintiff in error is estopped by his pleadings from raising any objection to the validity of the bills of lading, having filed a plea of the general issue unverified. Having gone to trial without any notice to plaintiff that the railroad intended to repudiate the acts of its agents, it was not permitted to raise that question. Had it by its pleadings advised us that it intended to repudiate its bills, then we might have been better prepared to meet any evidence upon that point; but by going to trial without verifying its plea, as provided by the statute of the State, the defendant is not permitted afterwards to dispute its contracts sued on.

III.

We do not propose to ask this Court to review or overrule the case of *Pollard* v. *Vinton*, 105 U. S., 7, unless it chooses to do so of its own motion.

With all humility, however, we suggest that while it may follow the early decisions in regard to a ship's bill of lading, that the same is not in consonance with the general maxims of the law on the subject of principal and agent.

We submit that if a railroad can be held liable for an assault and battery by a conductor on a passenger while engaged in putting him off the train for non-payment of fare, or if a bank can be held liable on the certificate of a check by its teller when there is no deposit in the bank to meet such check, that then should a railroad be held liable on its

bills of lading issued by an agent appointed for the purpose of conducting such business.

Commerce was a small affair in the days of *Lickbarrow* vs. *Mason*, but to-day the commerce of the world is conducted on the basis of the truthfulness of bills of lading. It would clog the wheels of commerce if it should become understood that no consignee in New York or Liverpool dare accept and pay a draft to which a bill of lading is attached, until he shall make inquiries as to the truth of the statements in such bill of lading.

I submit that it is not in consonance with the general principles of principal and agent, but that the case of Armour *vs.* Michigan Central Railroad Co., 65 N. Y., 111; and St. Louis and Iron Mountain Railway *vs.* Larned, 103 Ill., 293, express the true rule.

IV.

The question was fairly submitted by the court to the jury as to the possession of the property at the time the bill of lading was given.

V.

The evidence shows that at the time these bills of lading were signed there was a large amount of cotton of this grade and of these marks in the hands of the railroad, and also that in December 5,000 bales of this cotton was in possession of the railroad, and that over 5,000 bales of cotton, with same marks as this, were sent to parties other than plaintiffs.

If these other persons had rights superior to plaintiffs to this cotton, it should have been shown by defendant. The burden was upon them to show it. And upon our proving

that cotton of the quality of ours and of the description came into the hands of defendant, though after the bills of lading were given, yet, when it came into such possession, it became the property of the holders of the bills.

The Idaho, 93 U. S., 575.

Rowley *vs.* Bigelow, 12 Pick., 307.

Robinson *vs.* Memphis R. R., 16 Fed. R., 60.

Courts are created for the purpose of administering justice, and the courts will look at the facts for the purpose of seeing whether there has been any injurious error committed.

In view of the doctrine laid down in "The Idaho," all the instructions prayed for and refused were properly refused, for there was evidence tending to show at least that more than sufficient cotton of this character and description came into the hands of defendants with which to satisfy the demands of our bills of lading, and to which we were entitled, there being no proof of title in any other person.

Under the circumstances of this case every one of these instructions were properly refused, and for divers reasons, and as a series we have in our former brief shown that they could not be given.

VI.

It seems that for its own convenience the railroad employed a cotton compress to reduce the size of the bales. The cotton, when delivered to the company, was delivered for shipment and not for storage, and unless detained by shipper the railroad became subject to the liability of a carrier from the moment of its delivery. But it is immaterial. A warehouseman is just as much responsible as a common

carrier for the loss or conversion of property left with it; and hence, for this cotton it is liable in either capacity. It is liable under the common counts in the declaration as warehouseman, and under both the special and common counts as common carrier.

When nothing remains to be done by plaintiff but to recover the money, then the common counts are sufficient. Such is this case.

But having declared upon the contracts in this case, if we are entitled to recover, I do not think this Court will look carefully into it under what capacity the defendant may be liable. It is enough that it is liable on the contract made by it. There is not a single equity for defendant in this case. The railroad is simply attempting to shield itself behind the fraud of its agent, by which innocent persons were misled to pay their money.

Respectfully submitted,

A. M. PENCE,
Counsel for Defendants in Error.